84-1376

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No. 85-.....

In The

Supreme Court of the United States

October Term, 1984

GRIM HOTEL COMPANY, PARIS NICHOLSON CORPORATION, CHARLES ALBERDING, WACO CORPORATION, HEARTEX CORPORATION, and SABINE HOTEL COMPANY,

Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, and 177 NAMED EMPLOYEE PLAINTIFFS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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March 1, 1985

QUESTIONS PRESENTED

1. Whether a corporate officer may be held personally liable for the corporation's failure to pay minimum wages and overtime compensation, when that officer did not deal directly with rank-and-file employees or determine the wages paid employees.

2. Whether, pursuant to a state long-arm statute, a federal District Court may constitutionally exercise personal jurisdiction over an individual on the basis of acts in the forum state which he performed solely in his capacity as a corporate officer.

3. Whether five corporations constitute an "enterprise" as defined in the Fair Labor Standards Act if they each make separate personnel and operating decisions, their ownership differs, and they do not serve the same type of clientele.

PARTIES BELOW

Appellants below were Grim Hotel Company, Paris Nicholson Corporation, Waco Corporation, Heartex Corporation, Sabine Hotel Company, and Charles Alberding. Appellees below were Raymond J. Donovan, Secretary of Labor, United States Department of Labor, and 177 named employee plaintiffs. A listing of these employee plaintiffs appears in Appendix A.

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Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, and 177 NAMED EMPLOYEE PLAINTIFFS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Grim Hotel Company, Paris Nicholson Corporation, Charles Alberding, Waco Corporation, Heartex Corporation, and Sabine Hotel Company[1] petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Partial Judgment of the United States District Court for the Eastern District of Texas, dated September 16, 1983, is set forth in Appendix B. The Memorandum Opinion of the

[1]The Petitioner corporations have no parent companies, subsidiaries or affiliates.

District Court is set forth in Appendix C. The Order of the District Court relating to the question of personal jurisdiction is set forth in Appendix D. The opinion of the Court of Appeals for the Fifth Circuit, dated December 3, 1984, is set forth in Appendix E.

JURISDICTION

The judgment of the Court of Appeals was entered on December 3, 1984. This petition is filed within ninety days of that judgment. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1976).

STATUTORY PROVISIONS

The provisions of Texas Revised Civil Statutes article 2031b, as amended, are set forth in Appendix F. The pertinent provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, are set forth in Appendix G.

STATEMENT OF THE CASE

The Secretary of Labor and 177 named employees ("the Secretary") brought this action in the Eastern District of Texas against five hotel corporations and their president for alleged violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* The Secretary contended that Petitioners Grim Hotel Company, Paris Nicholson Corporation, Waco Corporation, Heartex Corporation, and Sabine Hotel Company ("the Hotels"), each of which owned a single hotel in Texas, constituted an "enterprise" as defined in the FLSA and were therefore liable for their admitted failure to pay minimum wages and overtime. The Secretary further contended that Petitioner Charles Alberding ("Alberding"), an officer of each corporation, was individually liable under the FLSA as an "employer." The

Secretary sought damages and injunctive relief. The District Court had subject matter jurisdiction pursuant to Sections 16(c) and 17 of the FLSA, 29 U.S.C. §§ 216(c), 217.

The hotels were incorporated at various times by Alberding. Each owns a single lodging facility in small towns in Texas. Some of the facilities cater primarily to transients, like traditional hotels; others are more like apartment houses, serving mainly permanent residents (4. R. 28-29, 142; Appendix E, *infra*, p. 9). Alberding is President and a member of the Board of Directors of each corporation, but, at all times relevant to this proceeding, owned no stock in any of the hotels (Appendix C, *infra*, pp. 2-3). The stock of each hotel is owned by one or more of Alberding's daughters and Alberding's son-in-law (Appendix C, *infra*, p. 2), and is not controlled by Alberding through any voting trust or other such arrangement (6 R. 67).

The hotels' operations are separate and distinct. Each hotel keeps separate books and records, files separate tax returns, and does not share tax losses or gains with the others (Appendix C, *infra*, p. 6). Each hotel has its own local bank account, and there is no shared account (*Id.*). The hotels do not share employees or transfer employees from one hotel to another (*Id.*). They do not commonly advertise, and advertising for one hotel does not generally appear at the others (*Id.*). The hotels do not share a common reservations line, or generally refer guests to each other (4 R. 77, 49, 61, 85, 111-112, 206, 224, 262, 269). There are no group meetings of the hotels' managers or other personnel (6 R. 77). Some things, such as bookkeeping and property insurance, are handled collectively (Appendix C, *infra*, p. 5), but there are exceptions even to this. For example, the Paris Nicholson Corporation handled its own bookkeeping, and

the Heartex Corporation handled its own property, franchise, and unemployment taxes. (4 R. 30-31, 145-146, 156).

Although Alberding hired and fired the managers of each hotel (Appendix C, *infra*, p. 4), the managers handled day-to-day operations, including purchases of operating supplies and routine maintenance (6 R. 75-76; 4 R. 33-34, 130-132, 156-158, 224). The managers also handled personnel matters. They determined how many employees were needed, assigned them to the various jobs, and set their work schedules. The managers hired, fired, and disciplined all hotel employees, and made any promotions and demotions (4 R. 29-30, 133-135, 159-162, 183-184, 203-205, 220-222). The managers also raised and lowered wages without discussing the matter with Alberding (4 R. 182-183, 221-222, 279). One manager, on her own authority and discretion, even began paying the minimum wage because it was necessary to attract the needed help (4 R. 182-184).

Alberding was not involved in personnel matters at the hotels; none of the managers ever talked to him about such matters (4 R. 30, 134-135, 160-161, 184, 221-222). Employees of the hotels never discussed the terms and conditions of their employment with Alberding and, in fact, seldom saw him (4 R. 46-47, 59-60, 84, 101-102, 112-114, 262-264, 266-268, 270-272).

Although Alberding, as President, had ultimate power over the rank-and-file employees, there was no evidence that he exercised that power, other than to hire and fire the hotels' managers. Alberding's involvement was generally limited to his duties as a corporate officer. For example, his approval was required for extraordinary expenditures or capital improvements (Appendix C, *infra*, p. 7), and he reviewed monthly operating reports sent to him by the hotel man-

agers (Appendix C, *infra*, p. 5). He sometimes sent out auditors or independent contractors if these reports indicated problems (6 R. 29-31).

Alberding challenged the District Court's personal jurisdiction over him individually. Alberding pointed out that all of his activities in Texas, the forum state, were in connection with his duties as President of the hotels and not in his individual capacity. He therefore argued that he had insufficient minimum contracts to justify the application of the Texas long-arm statute to him. The District Court ignored this distinction between Alberding's individual and corporate contacts and asserted personal jurisdiction over Alberding on the basis of his activities in Texas on behalf of the hotel corporations (See Appendix D, *infra*).

By agreement of the parties, the liability portion of the case was severed from the determination of damages and tried first. On July 25, 1983, the District Court issued its Memorandum Opinion finding that the hotels were an enterprise and had thus violated the FLSA and that Alberding was an employer and also responsible for those violations. On September 16, 1983, the District Court entered a Partial Judgment enjoining Alberding and the hotels from violating the minimum wage and overtime provisions of the FLSA.

Petitioners appealed this Partial Judgment and the United States Court of Appeals for the Fifth Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1292(a), affirmed the District Court's decision. Petitioners thereafter filed this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. IF THE DECISION BELOW IS ALLOWED TO STAND, ALL CORPORATE OFFICIALS, FROM FIRST-LINE SUPERVISORS TO SHAREHOLDERS, WILL BE "EMPLOYERS" UNDER THE FAIR LABOR STANDARDS ACT.

The courts below held that Alberding was an "employer" as defined by the FLSA and thus individually liable for the hotels' violation of the FLSA. Pursuant to the FLSA, an "employer" is "any person acting directly or indirectly in the interests of an employer in relation to an employee." 29 U.S.C. § 203(d). The District Court's and Court of Appeals' overly broad reading of this statutory definition converts the FLSA into a strict liability statute holding all corporate officers, and probably shareholders and supervisors as well, individually liable for any violations of the act by a corporation.

Alberding did not exercise the control over personnel matters necessary to make him a statutory employer. Although, as President of each hotel, he undoubtedly had the legal power to control personnel decisions, the evidence did not show that he exercised that power[2]. Alberding hired

---

[2]Despite the consistent, undisputed testimony of the hotel managers that the managers set wages, the District Court found that Alberding had to approve any increases in wages and that Alberding set the general range of permissible salaries (Appendix C, *infra*, pp. 7-8). In making this finding, the District Court relied in part on testimony that Alberding had to approve extraordinary capital expenditures by the hotels (*Id.* See also 6 R. 50). This testimony concerning capital expenditures did not relate in any way to wages or personnel costs. The remainder of the evidence on which the District Court relied was inadmissible hearsay to which Petitioners objected, and which the Court of Appeals disregarded for purposes of its decision (Appendix E, *infra*, p. 6-7 n. 2). Thus, although the Court of Appeals held that the District Court's conclusion on this question was not clearly erroneous (Appendix E, *infra*, p. 13 n. 7), that determination cannot stand. Since there is *no* record evidence to support the District Court's conclusion, that conclusion *must* be clearly erroneous.

the manager of each hotel, but each manager handled personnel matters at his or her hotel. The managers determined how many employees were needed, hired employees, disciplined employees, and fired any who had to be fired. The managers made all demotions or promotions. The managers assigned employees to the various jobs and set their work schedules. Each and every one of the sixteen current and former employees who testified confirmed that Alberding had never been involved with employees other than the managers.

Even as to non-personnel matters, Alberding's involvement with the hotel corporations was similar to that of any other corporate officer. For example, Alberding's name was on the signature cards of each hotel's local bank account (4 R. 127, 225) and his approval was required for extraordinary expenditures or capital improvements. Additionally, as President, Alberding was responsible to each hotel's shareholders for the hotel's performance, and he thus required monthly operating reports from the hotels' managers. As President, Alberding was also necessarily involved when city officials threatened to close down one of the hotels. (Appendix C, *infra*, p. 4). However, this involvement is no more than what *any* corporate officer does in the course of his regular duties.

The Court of Appeals held that, even though Alberding did not deal directly or indirectly with the employees of the hotels, he was an "employer" merely because he had the *ultimate authority* to so act. This attempted expansion of the "employer" doctrine demonstrates a misunderstanding of corporate governance. All corporate officers and many managerial employees have authority over a corporation's employees. Additionally, corporate directors, through their

power over the officers, and shareholders, through their ultimate voting control of the corporation, have indirect authority to act with respect to employees. Officers, directors and shareholders could all compel the corporation to pay a minimum wage, but it is unlikely that Congress intended for all such individuals to be liable as "employers."

Such a broad reading of the FLSA has been severely criticized by the First Circuit, which noted that:

> it should not lightly be inferred that Congress intended to disregard in this context the shield from personal liability which is one of the major purposes of doing business in a corporate form. It is difficult to accept, as the Secretary argues and as some courts have apparently held, that Congress intended that any corporate officers or other employees with ultimate operational control over payroll matters be personally liable for the corporation's failure to pay minimum and overtime wages as required by the FLSA.
>
> Nor do we think too much weight can be put on the Act's broadly inclusive definition of "employer". Taken literally and applied in this context it would make any supervisory employee, even those without any control over the corporation's payroll, personally liable for the unpaid or deficient wages of other employees.

Donovan v. Agnew, 712 F.2d 1509, 1513 (1st Cir. 1983). The Court of Appeals' decision makes *every* such person an "employer," even if he or she never became involved "directly or indirectly" in the affairs of employees. If such be the case, then there need be no proof to establish "employer" status. The Secretary would only have to show that one is not a rank-and-file employee and strict liability would follow. This broad reading of the FLSA is clearly wrong.

II. THE DECISION BELOW MAKES ALL CORPORATE OFFICIALS INDIVIDUALLY SUBJECT TO SUIT IN ANY STATE IN WHICH THEIR CORPORATION DOES BUSINESS REGARDLESS OF WHETHER THEY HAVE ANY INDIVIDUAL CONTACTS WITH THE STATE.

The District Court asserted personal jurisdiction over Alberding, a resident of Illinois, pursuant to the Texas long-arm statute, Tex. Rev. Civ. Stat. art. 2031b, and Fed. R. Civ. Proc. 4(e). The Court of Appeals upheld this decision, finding that Alberding individually was doing business in Texas and therefore was constitutionally subject to personal jurisdiction in Texas. In reaching this decision, the Court of Appeals relied on actions taken by Alberding in his capacity as President of the hotels. This exercise of personal jurisdiction over Alberding was unconstitutional.

The exercise of personal jurisdiction over a nonresident defendant must be consonant with "traditional notions of fair play and substantial justice" and the defendant must have sufficient "minimum contacts" with the forum state so as not to offend due process. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154, 161 A.L.R. 1057 (1945). The defendant must engage in purposeful activity related to the forum which would make the exercise of jurisdiction fair, just, and reasonable. *See Rush v. Savchuk*, 444 U.S. 320, 328-329, 62 L. Ed.2d 516, 100 S. Ct. 571 (1980).

It would be fundamentally unfair for a state to assert jurisdiction over an individual where his only contacts with the state were as a corporate officer and the plaintiffs' injuries did not flow directly from those acts. In such a situation, it cannot be said that the officer as an individual availed himself of the privilege of conducting activities within

the forum state. It is the hotels, not Alberding individually, that have invoked the benefits and protections of Texas law and that have caused the actions producing the Respondents' injuries. It is therefore only the hotels, not Alberding, that are subject to the jurisdiction of the Texas courts. As courts have noted,

> where the corporate agent engages in corporate business for the sole benefit of the corporation, it is difficult to see how the exercise of jurisdiction over one who has conducted no activities on his own behalf 'comports with fair play and substantial justice.'

State Security Ins. Co. v. Frank B. Hall & Co., 530 F. Supp. 94, 98 (N.D. Ill. 1981); *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1348 (E.D.N.Y. 1981). *See also Weller v. Cromwell Oil Co.*, 504 F.2d 927, 929-931 (dictum); *PSC Professional Services Group, Inc. v. American Digital Systems, Inc.*, 555 F. Supp. 788 (E.D. Pa. 1983); *Miller v. American Telephone & Telegraph Co.*, 394 F. Supp. 58 (E.D. Pa. 1975), *aff'd*, 530 F.2d 964 (3d. Cir. 1976). *But see Columbia Briargate Co. v. First National Bank*, 713 F.2d 1052 (4th Cir. 1983); *Marine Midland Bank v. Miller*, 664 F.2d 899, 902 n.3 (2nd Cir. 1981) (dictum). The District Court's exercise of personal jurisdiction over Alberding, based almost solely on his fulfillment of his corporate duties, did not comport with fair play and substantial justice.

In affirming the District Court's decision, the Court of Appeals relied on this Court's opinion in *Calder v. Jones*, ——U.S.——, 104 S. Ct. 1482, 79 L. Ed.2d 804 (1984). In *Calder*, this Court held that employees of a newspaper corporation publishing a libelous article were individually amenable to jurisdiction in California, even though their individual activities relating to the article were performed

for their employer in another state. The Court of Appeals' reliance on *Calder* is unjustified. In *Calder*, the individual employees had taken actions (writing and editing the article) which directly caused injury to the plaintiff in the forum. This Court held that these employees could not hide behind the corporation to avoid the effects of their own intentional torts.

Alberding's actions in the forum, on the other hand, did not directly produce any injury in the forum. The actions of Alberding in Texas on which the District Court relied were unrelated to the payment or non-payment of minimum wages or overtime. The plaintiffs' injury did not arise out of Alberding's actions in Texas on behalf of the corporation. In fact, as shown above, Alberding had no involvement with personnel matters or the employees at the hotels. Alberding is being held liable as a corporate officer for the corporations' actions in not paying the minimum wage. If the Court of Appeals' decision is correct, then no officer or managerial employee of a national corporation is protected against suit in any state where that corporation happens to do business. Such a boundless assertion of personal jurisdiction is inconsistent with constitutional due process.

III. BASED ON THE RECORD BELOW, THE ENTERPRISE THEORY OF THE FAIR LABOR STANDARDS ACT HAS BEEN UNJUSTIFIABLY EXPANDED FAR BEYOND ITS ORIGINAL INTENT, RESULTING IN A CONFLICT WITH A DECISION OF ANOTHER CIRCUIT.

The FLSA subjects to its minimum wage and overtime provisions entities which are individually too small to be within the FLSA, but which constitute an "enterprise." In order to be an "enterprise" as defined by the FLSA, these

separate entities must be engaged in related activities, must be operated for a common business purpose, and must be operated in a unified manner or by common control. 29 U.S.C. § 203(r). The Court of Appeals' determination that the five hotels constituted an enterprise and were thus subject to the FLSA is simply unsupported by the facts.

An examination of the results of the judgment below confirms that the enterprise theory was not meant to apply to these hotels. As the evidence shows, these small, separately-owned hotels are simply not profitable enough to pay the minimum wage. (See Defendants' Exhibit 18; 4 R. 155-156; 6 R. 68-69). The hotels are run-down and many of their rooms are in an unrentable condition. (See Defendants' Exhibits 5-17 (photographs of the hotels); 4 R. 74-75, 116-195). The decisions below, rather than aiding the employees the FLSA was designed to protect, will force the hotels to shut down, displacing residents (probably to relief of some type), and depriving many of the named Respondents of a job. Congress never intended for the FLSA to be used in this manner to increase unemployment among workers in small, marginal businesses.

A. Related Activities.

The Court of Appeals' decision on the question of whether the hotels are engaged in related activities creates a conflict among the circuits that needs to be resolved by this Court. In *Hodgson v. University Club Tower*, 466 F.2d 745 (10th Cir. 1972), the Tenth Circuit held that a facility housing transients and a facility housing permanent residents were not engaged in related activities, and were therefore not an enterprise. *See also Donovan v. Shteiwi*, 563 F. Supp. 118 (S.D. Ohio 1983) (fast-food restaurant and full-service restaurant are not engaged in related activities even though

they both serve food and beverages). That same distinction applies here. The Court of Appeals recognized that some of the "hotels" were essentially apartment houses, renting their units on a permanent basis, while others were more traditional hotels renting to transients. However, the Court of Appeals rejected this distinction adopted by the Tenth Circuit, holding that this distinction would be inconsistent with its prior, broad decisions. This Court should grant a writ of certiorari to resolve this dispute between the Fifth Circuit and the Tenth Circuit.

B. Unified Operation or Common Control.

The District Court did not find that the hotels were engaged in unified operations. Instead, the District Court held that the five hotels were an enterprise because they were commonly controlled. In so holding, the District Court and the Court of Appeals stretched the common control requirement far beyond its intended boundaries.

Neither common ownership nor mere business cooperation establishes common control. *Dunlop v. Ashy*, 555 F.2d 1228, 1231 (5th Cir. 1977). There must be a common control center making decisions for all units of the enterprise. *Id.* In finding common control, the Court of Appeals relied primarily on Alberding's actions as President of the hotels and the ownership of stock in the hotels by members of Alberding's family. This approach ignores the realities of corporate (and family) life. Each family member's stock was individually owned and controlled; there were no voting trusts or other such arrangements. The family members owning the stock were well into adulthood and free to throw out Alberding as President at any time. Alberding's status as husband and father provided him with no magic talisman to control fully competent adults who happen to be

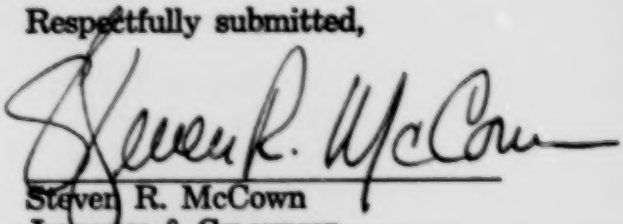
members of his extended family. The casebooks are filled with intrafamily disputes concerning corporate or partnership affairs. Such a family relationship was legally insufficient to establish common control.

Alberding's activities as President of the hotel corporations were also insufficient to establish common control. Alberding hired and fired the hotel managers, reviewed hotel operations, approved significant expenditures, and had his name on the hotels' bank accounts. He also had *authority* to raise wages and hire and fire employees. However, these activities, relied on by the Court of Appeals, are descriptive of virtually all corporate officers and directors. Pursuant to the decisions below, common control would exist whenever two corporations share common officers or directors. This broad expansion of the enterprise definition goes far beyond the intent of the FLSA.

CONCLUSION

For the reasons stated, Petitioners pray that their Petition for a Writ of Certiorari be granted.

Respectfully submitted,



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March 1, 1985

CERTIFICATE OF SERVICE

I certify that on this 28th day of February, 1985, three copies each of the foregoing Petition for Writ of Certiorari were deposited in the United States mail, first-class postage prepaid, addressed to the following counsel of record:

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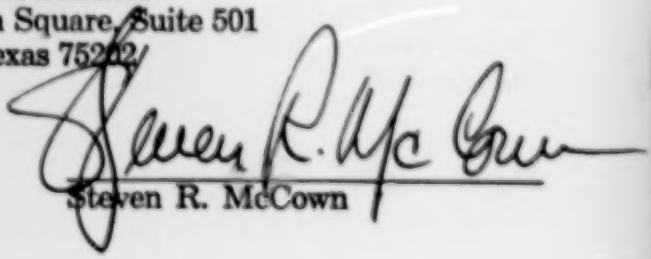

Steven R. McCown

APPENDIX

APPENDIX A

NAMED EMPLOYEE PLAINTIFFS

Nicholson House

Ethel Alexander
Neva Baker
Lois Bell
Bobby Bivins
Bobby Boutwell
Juanita Boutwell
Bettye Brock
Mary Bronner
James Butler
Doris Coble
Linda Coble
Faye Davis
Wanda Ferguson
Mary Fielderhaus
Carl Edward Ford
Pat Ford
Donna Fuller
Tom Hain
Norma Harrell
Ricky Harrell
Billy & Vicki Houston
Lindy Jeffrey
Edna Johnson
Elizabeth Johnson
Betty Killmer
Jean Knowles
Temple Lacek
Sharon Lane
Rick Lohrey
Ruth Marshall
Doris Nowell
Gary Nowell
Pearl Puetz
Sherry L. Ray
Evelyn Reed
Cheryl Riddle
Clara Bea Scott
Wm. Ship
Linda Short
Cynthia Sims
James Smith
Laverne Smith
Linda Smith
Michael Smith
Beverly Stephens
Scotty Sutton
Jean Sykes
Barbara Tulley
Bobby Ussery
Jeraldine Walters
Carol Weise
Mildred Wenzel
Lela Mae West
Irene Whitney
Debbie Whitworth
Jack Williams
Jimmie Wilkerson
Stephanie Windham
W. W. "Buddy" Wyatt
Mary Yates

A-2

Grim Hotel

Ida Bell Allen
Bernice Brown
Phyllis Brown
Gwen Burnett
Irene Chares
Dorothy Cheatham
John A. Cooper
Algie Mae Dixon
Allen Green
Betty Jo Hamilton
Jean Homan
LaVerne Jackson
Carolyn Johnson
Diana Johnson
Dorothy Johnson
E. L. Johnson
Jewel Johnson
David Leonard
Francis Lites
Ruby Lee Littrell
David Marsh
Modean Martin
Leslie Masters
Charlotte Mitchell
Carol Morgan
Debra Nard
Ronald Parlette
Lessie Peyton
Melba Ray
Richard Scott
Carol Shanley
James E. Shiffer
Dean Sidebotton
Dorothy Smith
Fred Stewart
John M. Stewart, Jr.
Mary J. Stewart
Milton Watkins
Troy Webb
Glen White
William Winfield

Denison Hotel

Helen Allen
Louise Baldwin
Edward Benedict
Leonora Bunch
Faye Fitzgerald
Warren Gound
Stanley Green
Fanny Greenwood
Norman Hall
Esther Harshaw
Wm. J. Harkins
Dorothy Hayden
Ora Lee Hock
Bessie Huffman
Sam Main
Ruby Mask
Kenneth Masters
Marvin McGee

Loreda McGehee
Alberta McKinney
Diane Moorehead
Katherine Owens
Eileen Price
Glen Price
Louise Richmond
Wilma Roberts
Jack Sebaugh
Norma Shaeffer
Charles St. Ange
Rosey Steele
Eugenia Taylor
Susan Threlkeld
Audrey Tompkins
Wallace Tompkins
Gorman Webb
Pauline Worthington

Hotel Raleigh

J. Steven Emmett
Jule McKee
John Garrett
Douglas Blackshear (Ms.)
Louise Bradshaw
Monte Bruce
Louise Cook
John Cotton
Pearline Franklin
Harry Gordon
Andrea Holl
Louise Maedgen
Harley Miller
Bobby Patina
Jesse Serrato, Jr.
Laurietta Serrato
Gene Spain
Bessie Williams
Kelly Ann Williams
Jewel McKee
Linda Starbard

Sabine Hotel

Jerry Arthur
Carol Hebert
Collins Clayton
Betty Stasney
Minnie Pearl Provost
Pauline Forney
Gevin Reese
Cathy Padilla
Lanell Fontanette
Mary Arrington
Mable Tompkins
Diane Antoine
Mary Alice Cheatam
Ethel Louis
Mildred Gosh
Barbara Wiltz
Harriet Taylor
Mabel Hull

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
PARIS DIVISION

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,
Plaintiff,

v.

GRIM HOTEL COMPANY, a Corporation;
PARIS NICHOLSON CORPORATION, a Corporation;
CHARLES ALBERDING, an Individual;
WACO CORPORATION, a Corporation;
HEARTEX CORPORATION, a Corporation;
and SABINE HOTEL COMPANY, a Corporation
Defendants.

Civil Action File
No. P-80-6-CA

PARTIAL JUDGMENT

In accordance with the findings of fact and conclusions of law signed and entered in this action on the 25th day of July, 1983, it is,

ORDERED, ADJUDGED and DECREED that defendants, their officers, agents, servants, employees and all persons in active concert or participation with them be and they hereby are permanently enjoined and restrained from violating the provisions of sections 6, 7 and 15(a) (2) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. Section 201, *et seq.*, hereinafter referred to as the Act, in any of the following manners:

1. Defendants shall not, contrary to sections 6 and 15(a) (2) of the Act, 29 U.S.C. §§ 206 and 215(a) (2), pay any employee who is engaged in commerce or in the production of goods for commerce, or who is employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, wages at a rate less the minimum hourly rates required by section 6 of the Act.

2. Defendants shall not, contrary to sections 7 and 15(a)(2) of the Act, 29 U.S.C. §§ 207 and 215(a)(2) employ any employee engaged in commerce or in the production of goods for commerce, or in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, for workweeks longer than forty (40) hours, unless the employee receives compensation for his employment in excess of forty (40) hours at a rate not less than one and one-half times the regular rate at which he is employed.

It is further ORDERED, ADJUDGED and DECREED that defendants be, and they hereby are enjoined and restrained from withholding payment of minimum wages and overtime compensation in the amount to be determined at a later time including any additional equal amounts as liquidated damages, which the court finds is due under the Act to defendants' employees. To comply with this provision of this judgment, defendants shall deliver to the plaintiff a cashier's or certified check payable to "Employment Standards Administration-Labor" in the total amount found due, less social security and income tax deductions, the proceeds of which check the plaintiff shall distribute to defendants' employees named herein. Any net sums which within one year after the payment pursuant to this judgment have not been distributed to such employees, or to their estate if necessary, because of plaintiff's inability to locate the proper persons, or because of their refusal to accept such sums, shall be deposited with the Clerk of this Court who shall forthwith deposit such money with the Treasurer of the United States pursuant to 28 U.S.C. § 2041.

Dated this 16th day of September, 1983.

/s/ Wm. Wayne Justice
United States District Judge

SOL Case Nos. 10882-10883

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS PARIS DIVISION

No. P-80-6-CA

RAYMOND J. DONOVAN, *et al.*

v.

GRIM HOTEL COMPANY, *et al.*

MEMORANDUM OPINION

The plaintiffs in the above-entitled and numbered civil action have brought this suit pursuant to the provisions of the Fair Labor Standards Act, as amended, 29 U.S.C. § 201, *et seq.*, (hereinafter "the Act"). The plaintiffs, including the Secretary of Labor and some 177 named individual employees of the defendants, allege that the latter have failed to pay the minimum wage and overtime compensation required by the Act, and have also failed to maintain adequate and proper payroll records. Injunctive relief is sought, to restrain the defendants from withholding the minimum wages, overtime compensation, and liquidated damages allegedly due and owing to the plaintiffs, and, further, from failing to maintain proper records.

Facts.

The plaintiffs in this civil action include a number of individuals who have performed services for the Hotel Raleigh, of Waco, Texas; the Sabine Hotel, of Port Arthur, Texas; the Nicholson House, of Paris, Texas; the Grim Hotel of Texarkana, Texas; and the Denison Hotel of Denison, Texas. During the time period between February 14, 1977, and the date of trial, these plaintiffs were compensated at wage rates well below the minimum hourly rates required by the Act. For example, plaintiff Sykes testified that she had been paid $1.75 per hour in 1977 and 1978, instead of the $2.65 per hour required by law. Moreover, for those work weeks including over forty hours of labor,

the plaintiffs were not compensated at rates of one and one-half times their usual rates of pay. Because the liability and damages issues have been severed in this case, it is not necessary to determine, at this time, the precise differences between the wages actually paid during this period and those wages required by the Act. Similarly, any value of rooms or meals provided to the plaintiffs above the amounts actually paid by the plaintiffs may be determined subsequent to a resolution of the liability issues.

The Grim Hotel is owned and operated by the Grim Hotel Company, a corporation. The Nicholson House is owned and operated by the Paris Nicholson Corporation; the Hotel Raleigh by the Waco Corporation; the Hotel Denison by the Heartex Corporation; and the Sabine Hotel by the Sabine Hotel Company, also a corporation. All such business entities are corporations, and all are named as defendants in this litigation.

The remaining named defendant is Charles Alberding, an individual, who resides in Chicago, Illinois. At all times relevant to this lawsuit, Alberding has been the president of the above named defendant corporations. His wife, Bethene Alberding, has served as secretary-treasurer. J. E. Scally, a long time business associate of Alberding, originally served as vice-president but is now retired. The Board of Directors for the defendant corporations consisted of Alberding, his wife, Bethene Alberding, and J. E. Scally. The stock for the Paris Nicholson Corporation was entirely owned by Alberding's wife, Bethene Alberding, from 1955 to 1976. In 1976, the stock was transferred in equal portions to Alberding's daughters, Ms. Mohr, Ms. Moore, and Ms. Cartwright. Similarly, the other hotel stock has been almost entirely owned by defendant Alberding and his wife and daughters. (Plaintiffs' Exh. 48.) Defendant Alberding himself has not held any shares in the Heartex Corporation, in his own name, since 1964. The same is true of the Grim Hotel Company.

Defendant Alberding is also president of the Hotel Services Company of Tulsa, Oklahoma. Scally is the vice-

president, and defendant Alberding's wife, Bethene Alberding, is the secretary-treasurer. Since 1975, these individuals have also constituted the board of directors. Bethene Alberding and Scally own the capital stock of this corporation. The same is true for the Tulsa Apartment Corporation, except that, since 1972, the shareholders have been Bethene Alberding and Tucker Mohr, the defendant's son-in-law. The two corporations share the same address. Although neither corporation is a named defendant in this case, certain background information is extremely relevant, as set out hereafter. Defendant Alberding has a similar relationship with a large number of other corporations in various states.

During the time period between February 14, 1977, and the time of trial, the defendant corporations have had either two or more employees engaged in commerce, or else were handling, selling, or otherwise working on goods and materials that moved in, or were produced by, commerce. Although the individual defendant hotel businesses were in poor condition and generated low profits, the annual gross volume of sales for the defendants, together, was not less than $250,000.00, exclusive of excise taxes, between February 14, 1977, and June 30, 1978. Between July 1, 1978, and June 30, 1980, such joint annual gross volume was not less than $275,000.00. From July 1980, until trial, the joint gross annual volume was not less than $325,000.00.

The defendant hotel corporations were part of a large group of corporations, many of which were engaged in either the hotel or apartment businesses. Like the defendant corporations, this group was owned and directed, for the most part, by defendant Alberding and his immediate family. The hotel and apartment businesses in this group have been loosely referred to as the Alsonnett Hotels, an acronym derived many years ago from the names of Alberding, Connett, and Gibson, three associates who had hoped to start a hotel chain. This plan never came to fruition, and the name "Alsonnett Hotels" does not refer to any independent umbrella corporation or partnership. Some sta-

tionery does exist bearing the name, however, and a number of the managers recognize the phrase.

As president of these corporations, defendant Alberding hired and fired most of the managers of the hotel and apartment units. Some were hired and trained by one Scarinzi, an assistant hired by Alberding to resolve occasional problems arising at the various properties. Defendant Alberding testified that he had the authority to hire and fire any other employees. This power, however, was seldom exercised, and was generally delegated to the local managers.

The local managers had reasonably broad discretion in handling the day-to-day operations of the hotels and apartments. They could hire, fire, and discipline employees, set work schedules, purchase routine supplies, and set room rates. Any unusual expenses, however, had to be approved by defendant Alberding. Thus, for example, the installation of a new air conditioning system would require his notification and prior approval. Similarly, Ms. Bunch, a manager, testified that her discretion to purchase general supplies was not without limits. Furthermore, defendant Alberding was notified of all current problems. On such occasions, he would either visit the hotels himself or send Scarinzi on his behalf. Bookkeeping difficulties were dealt with for Alberding's benefit by a Ms. Goddard of the Tulsa office. The problems would then be resolved pursuant to the advice and orders of Alberding, directly, or through his assistant, Scarinzi. On some occasions, Scarinzi would temporarily take over the actual management of a hotel. Defendant Alberding also acted for such hotels as were involved in legal matters. For example, he negotiated with Waco city officials, on behalf of the Hotel Raleigh, with respect to certain fire and safety complaints. Even when the various businesses were running smoothly, defendant Alberding would keep in touch with the several managers and make occasional visits to their premises. During such visits, he would give advice to the managers as to needed repairs and suggest painting and maintenance efforts. Neither Scally nor defendant Alberding's other relatives interfered with his decisions and actions.

As noted above, defendant Alberding would also send a Ms. Shirley Goddard to the various units, including those named as defendants herein, for the purposes of auditing the financial books and records. Goddard was originally hired by George York, of the Hotel Services Company, but she was on the payroll of Tulsa Apartments Corporation. The defendant corporations, like almost all of the other Alsonnett Hotel businesses, sent regular financial reports to the Hotel Services Company and to defendant Alberding. These reports were prepared according to instructions from the Hotel Services Company and Tulsa Apartment Corporation personnel. Such instructions were compiled pursuant to Alberding's specifications. From time to time, the managers at the various hotels received corrections from the Tulsa offices, which were required to be entered onto the books. From the monthly reports, the Tulsa personnel prepared corporate statements for defendant Alberding. Tulsa personnel also prepared payroll and performed bookkeeping services for a number of the hotels, including the Sabine, Denison, and Grim Hotels. Further, the Hotel Services Company prepared and often paid the corporate taxes for all hotels. Ms. Covington, of the Hotel Services Company, was responsible for insurance arrangements for the various corporations, including the named defendants in this case. Although some of the Texas properties were not insured, those which were covered were included in a master insurance policy, which was arranged for by the Tulsa offices. The property and ad valorem taxes were usually rendered and paid by the Tulsa offices, with the exception of those taxes accruing to the Denison Hotel. Workers compensation for the Hotel Denison, however, was paid for by the Tulsa center. Defendant Alberding was at all times in very close contact with the Tulsa personnel, especially Ms. Goddard and Ms. Covington. All special instructions as to their duties and decisions came from defendant Alberding. These business entities did not perform any services for any other corporations or businesses, except for those in which defendant Alberding and his immediate relatives had an interest or control. No fees for the various services provided were ever charged to the defendant corporations.

The defendant corporations, and the other Alsonnett enterprises described above, did not exchange employees or customers or share any advertising. Separate books and records were kept, and separate tax forms were filed. No bank accounts were shared, nor were any tax losses shared between the corporations. Nevertheless, it is quite clear from the evidence that the corporations were financially interrelated. The checking accounts for all of the above corporations had signature cards bearing, along with the name of the local manager, the names of Covington, Goddard, or Alberding. Defendant Alberding had made some $1,388,660.22 worth of loans and contributions to the Alsonnett group of hotels (including the named defendants) at various times. Funds were sent from the Tulsa offices during periods of financial difficulty. For example, Ms. Wenzel, the bookkeeper for the Paris Nicholson, testified that she had once been requested by the Tulsa offices to send $500.00 to the Grim Hotel. Although no explanations were offered, Ms. Wenzel sent the check immediately. On another occasion, after a serious loss, Ms. Wenzel received a check for $800.00 and was instructed to list the amount as payable to the Sabine Irrigation Company. (This action was also directed by defendant Alberding.) The Raleigh Hotel received funds from the Sabine Corporation to enable it to meet its payroll. Similarly, the Denison Hotel once received furniture from the Aldridge Hotel. No payment was made. Rather, the list of furniture received was simply sent to the Tulsa office. The Grim Hotel also purchased furnishings from the Nashville Hotel in 1979 for $42,000.00. No funds were actually paid to the Nashville Hotel, and the debt was transferred to the Hotel Services Company, either by reducing the debt owed to Hotel Services Company by Nashville, or by creating a debt owed to the Nashville Hotel by the Hotel Services Company. The financial records show a fluid shifting of debits and credits between the various corporations. Ms. Goddard testified that she occasionally transferred a debt owed by one corporation to Hotel Services Company, so as to show it to be owed to another company. This would be done on Alberding's

request and instructions. Although the precise relationship between all of these businesses is somewhat amorphous, it is clear that the various entities did not deal with one another at arms length. Moreover, the various corporations relied on defendant Alberding and one another for assistance during periods of financial hardship.

Defendant Alberding, as noted above, occasionally visited and frequently telephoned the various hotels and apartment buildings. The employees understood that he was the owner of the business, and that he should be treated with respect, given a good room, and promptly connected to the manager when he telephoned. The managers appear, for the most part, to have considered him their supervisor, either directly or through Scarinzi. For example, Don Huff testified that Alberding was critical of the removal of a certain counter fixture in the hotel. Defendant Alberding clearly set all central policies. (*See*, for example, Plaintiffs' Exhibits 23 and 26.)

There was much dispute as to whether defendant Alberding set the ceiling on the salaries paid to local employees. The employees testified that when they requested a raise, they were told by the managers that the matter was controlled by Alberding. Many managers evidently believed this to be the case. For example, Jerry Arthur of the Hotel Sabine admitted to making such a statement to a Department of Labor investigator, Logan. Moreover, a memorandum sent out by Scarinzi states that all raises required the prior approval of Alberding. The testimony of the managers at trial with respect to this issue was, however, somewhat uneven. Some stated that they had the authority to grant a raise to an employee and to set wage rates, without seeking the approval of Alberding. It was uniformly agreed, however, that any unusual costs or expenses would have to be approved in advance. Defendant Alberding flatly disclaimed any role in the setting of the wage rates. Upon careful consideration of the totality of the evidence presented, together with the demeanors of the various witnesses at the trial, it is found that the managers could independently grant a

small salary increase to an individual employee. However, the general range of the permissible salaries was set by defendant Alberding. Moreover, any blanket increases of all employees' salaries, so as to meet the minimum wage requirements, would have been so marked a change as to require advance approval from defendant Alberding. The local managers did not have the authority to unilaterally impose such a significant change.

Defendant Alberding was a named defendant in a similar minimum wage suit in the United States District Court for the Eastern District of Oklahoma, which was tried on November 10, 1976. A single enterprise was found to exist, although the district court also found that defendant Alberding was not an employer. *Marshall v. McAlester Corp.*, 438 F. supp. 1005 (E.D. Okla. 1977). This ruling as to Alberding was reversed by the Court of Appeals for the Tenth Circuit on February 11, 1980. (No. 78-1303; 78-1304.) Defendant Alberding was also found liable as an employer in *Donovan v. Sabine Irrigation Co., Inc.*, 531 F.S. 923 (W. D. La. 1981), *affirmed* 695 F.2d 190 (5th Cir. 1983).

Discussion

The first issue to be addressed is whether the five named defendant corporations may be said to constitute a single enterprise for the purpose of meeting the annual income requirements of the Fair Labor Standards Act. Unless such requisite income levels are met, the terms of the Act are inapplicable and there can be no liability. To be found to be a single enterprise, the defendant corporations must have engaged in related activities and have been operated for a common business purpose. Further, either common control or unified operations of the defendant corporations must have existed. *See generally*, 29 U.S.C. § 203(r); *Donovan v. Janitorial Services, Inc.*, 672 F.2d 528 (5th Cir. 1982).

The single enterprise question must be resolved by a close examination of the entire factual situation, and it does not turn on a finding of any one factual phenomenon. *Brennan*

v. Plaza Shoe Store, Inc., 522 F.2d 843, 846 (8th Cir. 1975); *Usery v. Mohs Realty Corp.*, 424 F. Supp. 20, 26 (W.D. Wisc. 1976). As noted by the Court of Appeals for the Fifth Circuit, the application of the Act to the particular set of facts presented admittedly requires a somewhat *ad hoc* and empirical approach. *Donovan v. Janitorial Services, Inc.*, 672 F.2d 528 (5th Cir. 1982). In performing the requisite analysis, the trial court should be guided by the firmly established principle of liberal construction of the Fair Labor Standards Act. *Donovan v. Janitorial Services, Inc.*, 672 F.2d 528, 530 (5th Cir. 1982). As stated in *Usery v. Mohs Realty Corp.*, 424 F. Supp. 20, at 26,

> [t]he Act was passed to prevent the exploitation of workers who exist at the lowest paid end of the labor market by providing the minimal standard of living necessary for their health, efficiency and general well being and by prescribing certain minimum standards for working conditions. "In applying the Act to the facts at hand, we must liberally construe it to 'apply to the furthest reaches consistent with congressional direction' in fulfillment of its humanitarian and remedial purposes." *Brennan v. Plaza Shoe Store, Inc.*, [522 F. 2d 843 at] 846 [8th Cir. 1975] citing *Mitchell v. Lubin, McGaughy and Assoc.*, 358 U.S. 207, 211, 79 S. Ct. 260, 3 L.Ed.2d 243 (1959).

With these principles in mind, the specific factors necessary to a finding of a single enterprise status will be discussed and analyzed, in consideration of the above described factual situation.

I. Related Activities

The applicable regulations set forth the definition of related activities with great clarity. 29 C.F.R. 779.206 reads in relevant part, as follows:

> (a) The Senate Report on the 1961 amendments states as follows, with respect to the meaning of related activities:

Within the meaning of this term, activities are "related" when they are the same or similar, such as those of the individual retail or service stores in a chain, or departments of an establishment operated through leasing arrangements. They are also "related" when they are auxiliary and service activities such as central office and warehousing activities and bookkeeping, auditing, purchasing, advertising and other services. Likewise, activities are "related" when they are part of a vertical structure such as the manufacturing, warehousing, and retailing of a particular product or products under unified operation or common control for a common business purpose. (Senate Report No. 145, 87th Cong., 1st Sess., Page 41.)

Thus, activities will be regarded as "related" when they are the same or similar or when they are auxiliary or service activities such as warehousing, bookkeeping, purchasing, advertising, including, generally, all activities which are necessary to the operation and maintenance of the particular business. So also, all activities which are performed as a part of the unified business operation will be "related," including, in appropriate cases, the manufacturing, warehousing, and distribution of its goods, the repair and maintenance of its equipment, machinery and its premises, and all other activities which are performed for the common business purpose of the enterprise. The Senate Report on the 1966 amendments makes it plain that related, even if somewhat different, business activities can frequently be part of the same enterprise, and that activities having a reasonable connection with the major purpose of an enterprise would be considered related. (Senate Report No. 1487, 89th Cong., 2d Sess., Page 7.) A more comprehensive discussion of "related activities" will be found in Part 776 of this chapter.

To summarize, the activities of a group of businesses will be deemed related, if they are the same or similar; or if they are auxiliary in nature. *Usery v. Mohs Realty Corp.*, 424 F.

Supp. 20 (W. D. Wisc. 1976). In this case, there is little doubt that the defendant corporations are engaged in such related activities, specifically, the provision, maintenance, and management of hotel rooms. Defendants urge that some of the hotels in question are actually apartment complexes, while the others provide units on a more traditional, short-term basis. Because of this difference, and by reason of the disparities in the nature of the public sector being served, defendants urge that the business activities in question are not related, as defined by the regulations.

This argument is wholly unconvincing. The regulations specifically use the phrase "same or similar." Defendants' interpretation would require the various businesses to, in effect, engage in identical activities. This is clearly not a reasonable construction of the statute or the regulations. As noted in *Brennan v. Plaza Shoe Store, Inc.*, 522 F.2d 843, 847 (8th Cir. 1975):

> The district court, in viewing the activities of the shops as unrelated to that of the shoe stores, focused on the difference between the merchandise handled by each, and on the clientele served. The district court noted that the dress shops displayed the "mod" styles attractive to young women, while the shoe store catered to the family trade. However, legislative history and long standing administrative rulings focus not on the variety of goods that are sold, but rather on the similarity of the business operations, such as retail sales, in determining whether the activities are related.
>
> In this case, we conclude that the shoe store and dress shop at each location engaged in related activities, for at each location the stores sold articles of wearing apparel . . . to the general public entering the premises which housed both stores. These activities clearly fall within the congressional and administrative concept of related activities. . . .

Defendant also urges that most of the hotels have now been leased out to independent businesses, and that leasing

and hotel operations are unrelated. This would, however, simply place a time limit on the liability period for the various defendant companies.

It is useful, at this point, to note that the enterprise in question doubtless includes a large number of other businesses which are not named as defendants in this case. Certainly all of the "Alsonnett" corporations engaged in the operation of hotels and apartments could be deemed to be engaged in activities "related" to those of the corporate defendants. Similarly, the activities of the Hotel Services Company and the Tulsa Apartment Corporation are unquestionably engaged in related activities, because of the auxiliary nature of their operations. Of course, some of the corporations in which defendant Alberding has an interest, such as the Sabine Irrigation Company, must be excluded from this broadly defined enterprise. As stated in 29 C.F.R. 799.211:

> Activities which are not related even if performed by the same employer are not included as a part of the enterprise. The receipts from the unrelated activities will not be counted toward the annual dollar volume of sales or business under section 3(s) and the employees performing such unrelated activities will not be covered merely because they work for the same employer. Common ownership standing alone does not bring unrelated activities within the scope of the same enterprise. If, for example, one individual owns or controls a bank, a filling station, and a factory, the mere fact of common ownership will not make them one enterprise. However, if it appears that there is a reasonable relationship of all the activities to a single business purpose a different conclusion might be warranted. Activities which are not "related" will be treated separately for purposes of the tests contained in section 3(s)(1) through (5) of the prior Act and section 3(s)(1) through (4) of the amended Act. For example, in the case where a single company operates retail grocery stores and also engages in an unrelated business of constructing homes, one

> "enterprise" for purposes of section 3(s)(1) of both the prior and the amended Act will consist of the retail grocery stores and any activities related to them, and home construction activities will constitute a separate enterprise. The latter will not be included in determining whether the retail business enterprise meets the conditions of section 3(s)(1), and the Construction employees will not be covered merely because the retail business is covered. The construction business will be considered separately under section 3(s)(4) of the prior Act and section 3(s)(3) of the amended Act.

It is not necessary, here, to define the precise parameters of the enterprise in questions, since only those corporations named as defendants may be held liable for any back pay or liquidated damages to the plaintiffs; and also because the joint annual income of the named defendants is, alone, sufficient to render applicable the provisions of the Act.

Mere consideration of the background evidence presented at trial as to the other corporations in no way causes any injustice to the unnamed corporations. They cannot be bound by the terms of the judgment entered here; and to the extent that they are not fully and fairly represented, there can be no collateral estoppel effect. Moreover, there is no unfairness to the named defendants in this case. The background information offered at trial as to the other corporations and to the interrelationships of the entire group was highly relevant to the issues to be proved. Finally, presentation of such evidence should have been readily foreseeable. Defendant cannot claim, with any reasonableness, unfair surprise or prejudice in this regard.

II. Common Business Purpose

It must next be determined whether the defendants share a common business purpose. As stated in *Marshall v. Elks Club of Huntington, Inc.*, 444 F. Supp. 957 (S.D. W.Va. 1977), this requirement is closely akin to the related activi-

ties concept. The courts have frequently stressed, in analyzing this issue, the importance of practical considerations and economic realities, as opposed to any fixed technical concepts. *Brennan v. Plaza Shoe Store*, 522 F.2d 843 (8th Cir. 1975).

In addressing the common business purpose question, the Court of Appeals for the Eighth Circuit quoted the following language with approval.

> [C]ommon ownership of "related activities" carries considerable weight toward a determination that is a "common business purpose." Generally, when a corporation is formed to carry out a particular business objective, all the activities in furtherance thereof which it may perform through unified operation or common control will, in economic reality, be related and for a common business purpose even though, in isolation, they may be quite dissimilar in kind and would, if separately performed, constitute separate business enterprises .... *Wirtz v. Columbian Mutual Life Insurance Co.*, 380 F.2d 903 (C.A. 6).

Brennan v. Plaza Shoe, Inc., 522 F.2d 843, at 848 (8th Cir. 1975). *See also* 29 CFR 779.212, 213.

In this case, the defendant corporations are owned and governed by the same group of major stockholders, namely, the Alberding family and J. E. Scally. As discussed above, all are engaged in related activities, and they share the common business objective of operating hotels for an economic profit. Precisely on point here is the case of *Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512 (1973), which dealt with a real estate management business. The management business directed the operations of nine separately owned buildings from a central office. The Supreme Court ruled that the "respondents' activities at the several locations are tied together by a common business purpose of managing commercial properties for profit. The fact that the buildings are separate establishments is specifically

made irrelevant by Sect. 3(r)." *Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 519 (1973).

The common business purpose requirement is comfortably met in this case.

III. Common Control

An evaluation of the issue of common control or unified operations requires a careful reading of the cornerstone case of *Schultz v. Mack Farland & Sons Roofing Co.*, 413 F.2d 1296 (5th Cir. 1969). McFarland had organized two roofing companies and provided all of the necessary capital to each. Virtually all of the stock was held by McFarland, his brother, his son, or his secretary. He set the management policies and retained ultimate control over all operations. Although local supervisors hired and fired the general employees and set the pay rates, McFarland employed and discharged the supervisors themselves. The Court of Appeals for the Fifth Circuit found the common control requirement to be fully satisfied.

The court began its analysis with the following legislative history:

> Thus, the very terms of the statute obviously contemplate that a covered "enterprise" may be comprised of separated incorporated establishments whose financial transactions are separately accounted for, as are those of any corporation, or whose business is conducted with that degree of independence in day-to-day operational management which is normally characteristic of physically separated establishments or multiple organizational units. That this was indeed the original intent of Congress was reaffirmed in 1966 when the "enterprise" provisions were amended, for at that time the committee reports of both the House and Senate, in discussing the basic purpose of the original provision, pointed out:
>
> > * * * the operations through substantial ownership or control of a number of firms engaged in

> similar types of business activities constitute, in the committee's view, related activities performed through unified operation or common control within the meaning of the definition of enterprise. The fact that the firms are independently incorporated or physically separate or under the immediate discretion of local management, as in Wirtz v. Hardin * * * is not determinative of this question. [House Report No. 1366, 89th Cong., 2nd Sess., p. 9: Senate Report No. 1487, 89th Cong., 2nd Sess., p. 7 (reproduced in 1966 U.S. Code Cong. News, pp. 3002, 3009)].

Schultz v. Mack Farland & Sons Roofing Co., 413 F.2d at 1300.

The court then proceeded to review a number of other cases in which a single enterprise was found to exist, based upon the selection and supervision of local managers by a representative of controlling shareholders. *See*, for example, *Wirtz v. Barnes Grocery Co.*, 398 F.2d 718 (8th cir., 1968); *West v. Wal-Mart, Inc.*, 264 F.Supp. 158 (W.D. Ark. 1967). The court also discussed similar "control" tests set forth under other statutes, noting that it is the power of actual control, as opposed to the exercise of such control, which is critical. Centralized control and common management at the local level were not found to be unreasonable requirements. *Sakrete of Northern California, Inc. v. N. L. R. B.*, 332 F.2d 902 (9th Cir. 1964) *cert. denied*, 379 U.S. 961. It was then concluded by the Court of Appeals for the Fifth Circuit that a single enterprise did exist.

The ruling was recently cited with approval by the Court of Appeals for the Fifth Circuit in *Donovan v. Janitorial Services, Inc.*, 672 F.2d 528 (5th Cir. 1982). Similarly, in *Dunlop v. Ashy*, 555 F.2d 1228 (5th Cir. 1977), it was stressed that a finding of common control cannot be based upon mere cooperation. Rather, key factors include central ownership and a central substantive power to render binding policy decision.

The common control requirement has clearly been satisfied in this case. Defendant Alberding and his immediate family, together with Scally, owned all of the stock in the defendant corporations, and they also constituted the Board of Directors. Neither Scally nor defendant Alberding's relatives interfered with Alberding's activities or decisions. Defendant Alberding, moreover, made large investments in the various corporations. He also trained, hired, and fired the local managers, either personally or through his agent, Scarinzi. Further, he had actual authority, although apparently seldom used, to hire and fire local employees. Alberding and Scarinzi were the direct supervisors of the local managers; and although such managers handled day-to-day matters, all issues of importance were controlled by Alberding. Any major expenditures, including the across-the-board payment of minimum wages, required his prior approval. All legal problems, ranging from fire and safety complaints by city officials to negotiations for a coffee shop lease, were handled by defendant Alberding, directly. Financial problems and maintenance difficulties were resolved pursuant to Alberding's advice and orders. Central policies, such as the proper format for bookkeeping and monthly statements, were set by the Tulsa offices, pursuant to Alberding's instructions. The same is true of the shifting of the debits and credits on the corporate books, as well as the exchanges of funds and furniture between the corporations. During times of hardship, financial assistance was arranged for these separate corporations by defendant Alberding.

There is simply no doubt that, in this case, the defendant corporations were subject to centralized control. It is, accordingly, found that the minimum wage requirements of the Fair Labor Standards Act are properly applicable to the defendants.

IV. Alberding's status as employer

An employer is defined by the Act as any person acting directly in the interest of an employer in relation to an employee. 29 U.S.C. § 203(d). This term has been inter-

preted to encompass one or more joint employers, *Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190 (5th Cir. 1983); *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir. 1973), *cert. denied*, 414 U.S. 819 (1973), and should not be limited by formalistic labels or common law notions of employment relationships. *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297 (5th Cir. 1975). Rather, a finding of employer-employee status must rest on an analysis of the evidence as a whole, and it must be rooted in a finding that the claimant, as a matter of economic reality, is dependent for his livelihood on his relationship with his alleged employer. *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662 (5th Cir. 1983).

The proper analysis in this case is much simplified by the recent ruling by the Court of Appeals for the Fifth Circuit in *Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190 (5th Cir. 1983). That case also involved defendant Alberding and his employer status *vis-a'-vis* the employees of the Sabine Irrigation Company, a corporation similar to those in question here. Although the facts were not identical to those presented in this litigation, the similarities, not surprisingly, are quite striking. Defendant Alberding had transferred his stock in the company in the early 1960's, but had continued to act as president of the corporation. Bethene Alberding acted as secretary-treasurer, and Scally was the vice-president. Finally Tucker Moore became the owner of 100% of the corporate stock. Day-to-day operations were delegated to a local manager, but the total number of employees and their rates of pay were set by the Hotels Services Company and the Tulsa Apartments Corporation. Alberding's permission was required for special purchases, the hiring of extra personnel, and the transfer of funds from other corporations, as needed. The Tulsa offices also handled payroll, tax, and insurance matters. When the Sabine account was short, Alberding would authorize Mrs. Covington to transfer funds from Hotel Services Company account.

The court ruled that defendant Alberding was an employer within the purview of the Act. Dealing first with the agreement that Alberding owned no stock and exerted no control over daily operations, the court wrote:

> Respecting the first argument, we perceive the parameters of 203(d) as sufficiently broad to encompass an individual who, though lacking in a possessory interest in the "employer" corporation, effectively dominates or otherwise acts or has the power to act, on behalf of the corporation vis a vis its employees. Assuming arguendo that Alberding had no authority to direct Sabine's activities, he would remain accountable for violations of FLSA if he independently exercised control over the work situation.

Donovan v. Sabine Irrigation Co., Inc., 695 F.2d 190, 195 (5th Cir. 1983).

The court noted the symbiotic relation of Sabine with the other corporations run by Alberding, also pointing out Alberding's indirect authority, through the Tulsa offices, over the conduct of Sabine business, "including all significant phases of its relationship with the irrigation personnel." It was concluded that, although the local managers performed many of the functions of an employer, ultimate control was vested in Alberding. Alberding was, accordingly, found to be an employer.

The same set of critical facts is present here. Defendant Alberding exercised ultimate control over the business activities of the named corporations, either directly or through the Tulsa offices. He provided substantial financial assistance as needed; and on occasions, he required contributions to be sent to other corporations. The Tulsa offices handled many matters traditionally managed by an employer, such as payroll, taxes and insurance. Moreover, an across-the-board raise to minimum wages was within Alberding's sphere of control. Defendant Alberding is clearly an employer of the 177 named individual plaintiffs

in this case, pursuant to the ruling in *Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190 (5th Cir. 1983).

V. Remedy

It must next be determined whether the three year or the two year statute of limitations is properly applicable in calculating back pay liability in this case. Wilful violations of the Fair Labor Standards Act will trigger the three year limitations period, pursuant to Section 255(a) of the Portal to Portal Act, 29 U.S.C. § 255. *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983). Otherwise, liability for back pay is limited to the two year period prior to the filing of the complaint.

The proper standard for wilfulness was established in *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1971). The Court of Appeals ruled in that case that an employer need merely be aware of the possibility of the applicability of the Fair Labor Standards Act. In *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983), the Court of Appeals noted that an employer may not assume an "ostrich like cultivation of ignorance", and that "good faith will not shield a defendant from inquiring into his obligations and determining the parameters of his obligations." In *Coleman v. Jiffy June Farms, Inc., supra*, the defendant had actually obtained legal advice concerning his situation. *See also Donovan v. Sabine Irrigation Co., Inc, supra* (three year statute of limitations applicable where the employer knew or suspected that his conduct was governed by the FLSA).

Defendant Alberding and various other corporations directed by him had already completed a full trial on the precise issues raised in this litigation prior to February 14, 1977. *Marshall v. McAlester Corp.*, 438 F. Supp. 1005 (E. D. Okla 1977). Throughout most of the liability period in question, Alberding knew that the trial court in *McAlester* had ruled that a single enterprise did exist. He also knew that the Department of Labor was firmly convinced that he, personally, should be liable as an employer, and that

the matter was then on appeal. Similar litigation was being brought in other courts against him and his other corporations. Clearly, defendant Alberding knew that his operations might be governed by the Act. Hence, the three year period of liability shall be imposed here.

Similarly, liquidated damages are also appropriate here. As noted by the Fifth Circuit in *Reeves v. International Telephone & Telegraph Corp.*, 616 F.2d 1342, at 1352 (5th Cir. 1980):

> Section 11 of the Portal to Portal Act imposes on an employer seeking to escape liquidated damages the plain and substantial burden of proving that its violation was "both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict." Barcellona v. Tiffany English Pub Inc., 597 F.2d 464, 468 (5th Cir. 1979). IT&T has not offered sufficient evidence to demonstrate that its failure to pay overtime wages in accordance wtih the Act was in reasonable good faith. As decisions have shown, the presumption of wilfulness stands, absent positive and compelling proof of good faith. It is not enough, for instance, to plead and prove ignorance of the wage requirements. Knowledge will generally be imputed to the offending employer.... Good faith requires some duty to investigate potential liability under the Act. Barcellona v. Tiffany English Pub, Inc.

In this case, defendant Alberding had the benefit of the detailed regulations and statutory definitions, as well as the single enterprise ruling in the *McAlester* case. He is clearly a person of keen intelligence and sophistication, one who possesses great business acumen. Yet, despite his status as president of the defendant corporations, he failed to assure the payment of minimum wages at the Texas premises. Evidently he chose to take the risk of an eventual reversal by the Court of Appeals for the Tenth Circuit on the issue of his personal liability. There is no unfairness in requiring him to bear the financial consequences of such choice.

Finally, the defendants claim that any imposition of liability in this case would violate their due process rights under the Fourteenth Amendment of the United States Constitution. This argument is based upon the assertion that the Fair Labor Standards Act is unconstitutionally vague with respect to the single enterprise and employer status issues.

This claim must fail. The regulations enacted pursuant to the Act give detailed explanations and clarifying examples for these issues. Similarly, there has been much clarification of these issues by the courts themselves. Although the precise demarcation point between legal and illegal behavior cannot be statutorily identified with absolute precision, the defendants had more than sufficient notice that their actions were in violation of the Act. This is not a difficult or borderline case. The constitutional defense is, therefore, rejected.

VI. Recordkeeping

The plaintiffs submitted certain exhibits into evidence during the trial raising strong questions as to the propriety and adequacy of the defendant's bookkeeping processes. No brief, however, have been submitted on this issue. Rather than speculate as to the precise arguments and positions of the parties with regard to this issue, no ruling will be made on this matter. Should plaintiffs still desire injunctive relief on this issue, a supplementary brief must be filed within ten days of the date of service of this memorandum opinion.

VII. Personal Jurisdiction

Defendants continue to argue that this court lacks personal jurisdiction over defendant Alberding. For the reasons set forth in this court's order of October 27, 1981, such claim is rejected.

SIGNED and ENTERED this 25th day of July, 1983.

/s/ Wm. Wayne Justice
Chief Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION
CIVIL ACTION

No. P-80-6-CA

RAYMOND J. DONOVAN, et al.,

v.

GRIM HOTEL COMPANY, et al.

ORDER

The above-styled civil action is brought under the Fair Labor Standards Act, as amended, 29 U.S.C. §§ 201, *et seq.*, seeking to enjoin alleged violations of the Act. The action is brought against several corporations doing business in the State of Texas, and also against Charles Alberding, president of these corporations, in his individual capacity. Defendant Charles Alberding has filed a motion to dismiss the action, as against him, for lack of personal jurisdiction, pursuant to Rule 12(b)(2). Specifically, defendant contends that the court lacks jurisdiction over him, because he has not personally engaged in business in Texas, and, therefore, may not be served with process under the state "long-arm statute", Art. 2031(b), Tex. Rev. Civ. Stat.

The Fair Labor Standards Act (FLSA) creates a federal right, which may be enforced in federal courts. However, in passing the FLSA, Congress did not provide a nation-wide service of process under the Act. Though, given the objectives of the Act, nation-wide service may be implicit in the statute, that question is not raised in this action, and will be pretermitted. In the absence of such a provision, plaintiffs must rely on the state statute concerning extra-territorial service of process to establish personal jurisdiction over defendant. *See* Rules 4(d)(7) and 4(e), F.R.CIV.P.

In relying upon the state long-arm statute, plaintiffs must meet a two-prong test. First, the state statute under which service was effectuated must actually provide for service against the particular defendant in question. It is only when the statute authorizes the exercise of personal jurisdiction that the second prong of the test is implicated, *i.e.*, whether the assertion of jurisdiction accords with constitutional standards of due process. *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1264 (5th Cir. 1981).

The relationship between the scope of service provided by Art. 2031(b) and the breadth allowed by constitutional strictures is not clear. At different times, the Fifth Circuit has concluded that the statute "authorizes assertion of personal jurisdiction over nonresidents to the limits of due process," *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1266, *rev'd and rem'd sub nom. LeRoy v. Great Western United Corp.*, 443 U.S. 173 (1979), and that it is more restrictive than the limits of due process. *See, e.g., Prejean v. Sonatrach, supra*, 652 F.2d at 1265, 1267. In any event, it seems proper first to examine whether defendant is amenable to service under Art. 2031(b). *See Oswalt v. Scripto, Inc.*, 616 F.2d 191, 196 (5th Cir. 1980).

The Texas statute provides personal jurisdiction in causes of action arising out of activities or business done within the state. Section 2 restricts amenability to service of process to "any action . . . arising out of [business engaged in within the state.]" Section 3 confines amenability to "any action, suit or proceedings arising out of such business done in this State." Section 4 defines doing business as including but not limited to the entering into a contract, by mail or otherwise, with a resident of Texas to be performed in whole or in part by either party in Texas. *Prejean, supra*, 652 F.2d at 1265. On its terms, then, the statute provides jurisdiction only in suits arising out of contacts with Texas. It requires "a nexus between the contacts with the forum and the cause of action of such a kind as to make the cause of action arise from those contacts." *Id.*, at 1267. Against this background, the particular facts surrounding defendant's contacts with

this state, and the relationship of those contacts with the instant cause of action, will be examined.

It appears that defendant has entered into a series of contracts which were to be performed in the state of Texas. Specifically, these contracts include the purchase and operation of the hotels and corporations which are co-defendants in this action. He has entered into contracts of employment with Texas residents, to serve as managers in the various enterprises. These contracts necessarily and foreseeably entailed further contracts, for the employment of Texas residents to staff the hotels. Moreover, defendant has engaged in a number of other contracts, ancillary to the contracts set forth. Deposition testimony taken in the course of pre-trial discovery reveals that defendant has visited Texas to oversee the operation of the hotels, to discuss with local employees capital improvements, and for other business matters. (Deposition of Charles Alberding, pp. 51-53, 57.) Additionally, defendant's local managers send him monthly reports, which are reviewed, and occasionally audited, under defendant's supervision. Defendant has lent money to one of the hotels, to assist it in paying ad valorem taxes, in order that it might continue to operate. The money was sent directly to the manager of the hotel. (*Id.*, at 22, 23.) The testimony indisputably demonstrates that defendant has established and managed corporations which do business in Texas, and that in doing so, he has availed himself of the benefit and protection of Texas corporation laws. There is a clear nexus between defendant's contractual relations with Texas residents and the cause of action asserted here. Though defendant avers that the persons he has employed to manage his hotels have full autonomy in making hiring decisions, the close supervision of the business workings of the various corporations confutes this claim of independence. Defendant is clearly "doing business" in Texas, for purposes of assertion of personal jurisdiction.

Even though these contractual relations of defendant are sufficient to create a nexus with Texas, the assertion of personal jurisdiction must still pass the constitutional test.

The "minimum contacts" standard set forth by the Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) has undergone substantial refinement. In essence, the Due Process Clause requires that the contact between a person and the state wherein jurisdiction is asserted be purposeful, and not fortuitous. "When a defendant purposefully avails himself of the benefits and protection of the forum's laws, . . . maintenance of the lawsuit does not offend traditional notions of fair play and substantial justice." *Prejean, supra*, 652 F.2d at 1268. In determining the scope of "purposeful availment," the nature and extent of the contact, the foreseeability of consequences within the forum and continuing contacts arising from the purposive acts should be considered. If, in consideration of these factors, it appears that defendant should be on notice that his actions might subject him to the process of the state, then the strictures of due process have been met, and he is amenable to service of process by that state. *See generally, Milliken v. Meyer*, 311 U.S. 457 (1940). A review of the evidence adduced thus far in this action reveals that defendant has, beyond doubt, purposefully availed himself of the benefits and protections of Texas law, and in doing so has subjected himself to the laws of that state. Thus, the assertion of personal jurisdiction over him, by a federal court sitting in Texas, does not offend the constitutional requirement of due process of law.

Accordingly, it is

ORDERED that defendant Charles Alberding's motion to dismiss for lack of personal jurisdiction is, hereby, DENIED.

SIGNED and ENTERED this 27th day of October, 1981.

/s/ Wm. Wayne Justice

Chief Judge

APPENDIX E

Raymond J. DONOVAN, Secretary of Labor, United States Department of Labor, and 177 Named Employees, Plaintiffs-Appellees,

v.

GRIM HOTEL COMPANY, A Corporation, et al., Defendants-Appellants.

No. 83-2629.

United States Court of Appeals,
Fifth Circuit.

Dec. 3, 1984.

Secretary of Labor and 177 named Texas hotel employees sued five hotel corporations and their president for violations of the Fair Labor Standards Act regarding minimum wage and overtime pay. The United States District Court for the Eastern District of Texas, William Wayne, Justice, Chief Judge, entered partial summary judgment as to liability and issued permanent injunction, and defendants appealed. The Court of Appeals, Tate, Circuit Judge, held that: (1) the five hotel corporations, each of which owned one hotel were one enterprise as they were controlled and managed by founder/president; (2) the president was an "employer"; (3) court had personal jurisdiction of the president, an Illinois resident, as his Texas-connected acts were not performed solely in his corporate capacity; and (4) judgment in prior litigation with regard to Oklahoma hotel and prior Oklahoma corporation controlled by the defendant did not, on res judicata grounds, bar instant suit.

Affirmed.

1. Labor Relations — 1122

Despite corporate fragmentation in operation, a single "enterprise" exists for purpose of overtime and minimum wage provisions of Fair Labor Standards Act where the corporations perform related activities through uniform operation or common control for a common business purpose. Fair Labor Standards Act of 1938, § 3(r), 29 U.S.C.A. § 203(r).

See publication Words and Phrases for other judicial constructions and definitions.

2. Labor Relations — 1562, 1567

Whether an "enterprise" exists, for purpose of minimum wage and overtime provisions, is a conclusion of law, but subsidiary fact-findings are subject to review under the clearly erroneous standard. Fed. Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.; Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

3. Labor Relations — 1122

Fact that ratio of long-term to short-term guests of each of five hotels was different each did not mean that the corporations did not engage in related activity, for purpose of determining whether the family corporations were "enterprise" for purposes of minimum wage and overtime legislation. Fair Labor Standards Act of 1938, § 3(r), 29 U.S.C.A. § 203(r).

4. Labor Relations — 1122

In applying the uniform operation or control concept of "enterprise" in case of corporate fragmentation the court, in a minimum wage and overtime suit, must look beyond formalistic corporate separation to the actual or pragmatic operation and control, whether unified or separate as to each unit and must ask how centralized is the making of significant corporate decisions, whether a single source created

and funded the corporations or businesses and how interdependent are those corporations or businesses in actual operation and whether they are held out to the public singly or collectively. Fair Labor Standards Act of 1938 § 3(r), 29 U.S.C.A. § 203(r).

5. Labor Relations — 1105

Fair Labor Standards Act is to be construed liberally because by it Congress intended to protect the country's workers. Fair Labor Standards Act of 1938, § et seq., 29 U.S.C.A. § 201 et seq.

6. Labor Relations — 1122

Five hotel corporations each owning a hotel, were a single "enterprise" for purpose of minimum wage and overtime legislation where individual who was president of each corporation and who along with his wife and children owned almost all of the stock, controlled the hotels' managers, personally funded the corporation where necessary and had virtually sole authority to approve significant expenditures and was the only person who could approve across-the-board hearing to federal minimum wage and overtime requirements, the hotels loosely operated under the same informal banner and hotels shared the same officers and a related company provided bookkeeping and financial services. Fair Labor Standards Act of 1938, § 3(r), 29 U.S.C.A. § 203(r).

7. Labor Relations — 1122

Individual who was founder and president of five hotel corporations was an "employer" for purpose of minimum wage and overtime legislation where he held the purse strings and guided corporate policy and was the only one who could authorize compliance with labor standards and he personally selected managers of each hotel and traveled to Texas to inspect hotels and solve major problems and hotels were part of a family business. Fair Labor Standards Act of 1938, §§ 3(d), 6-7, 29 U.S.C.A. §§ 203(d), 206-207.

8. Constitutional Law — 305(5)
Federal Courts — 76

When personal jurisdiction over a non-resident is asserted by reason of state long-arm statute, not only must the statute apply, but its application must conform to due process requirements. U.S.C.A. Const. Amend. 14.

9. Constitutional Law — 305(5)
Federal Courts — 76.35

Action of Illinois resident, who was president of five family-owned Texas hotel corporations, in hiring managers, regularly traveling to Texas to oversee operations, making personal loans to the corporations and personally signing loan agreements, satisfied the doing-business-by-contract provision of Texas long-arm statute, including the employment recruiting task, notwithstanding contention that Texas contacts were in the nonresident role as corporate president as suit was for violations of federal law, under which the resident was statutorily categorized as an employer and personally responsible for minimum wage and overtime deficiencies and personal jurisdiction complied with constitutional due process requirements. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; Vernon's Ann.Texas Civ.St. Arts. 2031b, 2031b, § 4; U.S.C.A. Const. Amends. 5, 14.

10. Constitutional Law — 305(5)

Consistent with due process, a nonresident employer may be sued for employment practices in the forum in which he has recruited his employees and caused them to undertake the work. Fair Labor Standard Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; U.S.C.A. Const. Amends. 5, 14.

11. Constitutional Law — 305(5)

Due process is not offended when a nonresident corporate agent or employee is made subject to personal jurisdiction in the forum state for a foreseeable consequence therein of

a personal act performed elsewhere, although allegedly performed only as a corporate functionary. U.S.C.A. Const. Amends. 5, 14.

12. Judgment — 585(3), 707

Prior wages and hour litigation with regards to Oklahoma hotel and three Oklahoma corporations involving finding that the Oklahoma operation was part of a single enterprise of the corporate founder did not bar subsequent action against the founder and five Texas hotel corporations on ground that prior suit involved same enterprise found to exist in regard to the Texas entities and that such entities should have been made parties to the prior litigation as the prior suit did not involve the same cause of action nor identical parties or privies and subsequent action concerned violation as to different group of employees occurring almost wholly after entry of prior judgment. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

13. Judgment — 739

Prior adjudication for or against an employer with regard to Fair Labor Standards Act violation does not bar a subsequent suit arising from a subsequent or different factual situation or from the activities of an entirely different group of people. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

Appeal from the United States District Court for the Eastern District of Texas.

Before BROWN, TATE, and HIGGINBOTHAM, Circuit Judges.

TATE, Circuit Judge:

The Secretary of Labor and 177 named Texas hotel employees brought this suit in 1980 against five hotel corporations and their president for violations of the Fair Labor

Standards Act of 1938, 29 U.S.C. § 201 *et seq.*, in the operation of five Texas hotels that have occurred in the period following February 14, 1977. Trial of liability and damage issues was severed. Following trial of the liability issue, the district court in 1983 entered a partial judgment that permanently enjoined the defendants from violation of the minimum wage and overtime requirements of the Act, 29 U.S.C. §§ 206, 207.[1] The defendants appeal this judgment granting injunctive relief. 28 U.S.C. § 1292(a).

On their appeal, the defendants do not deny that the hotel workers in question have not received the minimum wage and overtime compensation required by the Act, if the Act applies here. Rather, they challenge the district court's injunction requiring conformance to the requirements of the Act on the grounds: (I) that the corporate-employers do not constitute an "enterprise" within the meaning of the Act; and (II) that the president of those corporations, Charles Alberding, is not an "employer" within the meaning of the Act. They also raise procedural contentions (III) that the district court lacked personal jurisdiction of Alberding and (IV) that res judicata barred the grant of relief in the present case. Finding no merit in any of these positions, for reasons discussed, respectively, in I through IV, *infra*, we affirm.[2]

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[1]The Act contains a minimum hourly wage requirement, 29 U.S.C. § 206, and a requirement that an increase over required wages be paid to employees for overtime work (in excess of forty hours per week), 29 U.S.C. § 207. Employees are permitted to sue employers for "unpaid minimum wages" and "unpaid overtime compensation." 29 U.S.C. § 216(b). The Secretary of Labor may sue employers to enjoin future violations and to require them to pay their employees past unpaid minimum wages and overtime compensation. 29 U.S.C. §§ 216(c), 217.

[2]The defendants also raise several other insubstantial contentions that do not merit discussion. Without citation of relevant authority, they claim that provisions of the Fair Labor Standards Act are unconstitutionally vague, a contention quickly disposed of by the district court as patently meritless. They also question two evidentiary rulings of the district court: one involving the admission as

Facts

The employees whose wages are in issue work in five hotels in five different Texas cities. Each of the five hotels is owned by a corporate defendant, and each of these corporations has the one hotel as its sole asset. The remaining defendant, Charles Alberding, is president of the five hotel-owning corporations.

Alberding incorporated those corporations and has managed their operation. His wife has been the secretary-treasurer of the corporations, and his close business associate, J. E. Scally, has been their vice-president until recently. The board of directors of each corporation has consisted of Alberding, his wife, and Scally. Though the stock of the corporations has been transferred within the Alberding family, virtually all of it has been owned by Alberding, his wife or their daughters.

Alberding and the five defendant corporations controlled and managed by him contend that, by virtue of this corporate fragmentation of his/their hotel operations, they are not a single "enterprise," *see I infra*, and he himself is not an "employer," *see II infra*, for purposes of coverage of the Fair Labor Standards Act. The courts have in the past rejected similar efforts through corporate fragmentation by Alberding to avoid obligations and liabilities under the Act.[3] In its

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relevant of evidence concerning the activities of other Alberding corporations in coordinating and assisting the functions of the five defendant corporations — clearly involving no abuse of trial court discretion; and one involving the admission of allegedly hearsay testimony, which, even if erroneous (and we accept this for argument only), was harmless.

[3]Alberding and three of his Oklahoma corporations were found responsible for minimum wage and overtime pay violations at an Oklahoma hotel owned and operated in a manner nearly identical to the Texas hotels involved in this case. *Marshall v. McAlester Corp.*, 438 F.Supp. 1005 (E.D.Okla.1977), *aff'd in part & rev'd in part*, Nos. 78-1303, 78-1304 (10th Cir.) (holding Alberding liable as an "employer"), *cert. denied*, 449 U.S. 828, 101 S.Ct. 93, 66 L.Ed.2d 32 (1980). Recently, this circuit found Alberding responsible for

thorough and thoughtful memorandum opinion, the district court likewise rejected the similar contentions here advanced.

I. *Five Corporations As One Enterprise*

The minimum wage and overtime provisions of the Fair Labor Standards Act apply to employees of "an enterprise engaged in commerce or in the production of goods for commerce," 29 U.S.C. §§ 206, 207, which "enterprise" is statutorily defined, inter alia, as requiring an annual gross volume of business done as not less than $250,000, 29 U.S.C. § 203(s)(1). The parties have stipulated that each of the hotel corporations has not had a sufficient dollar volume of business to come within the Act's definition of an enterprise "engaged in commerce." 29 U.S.C. § 203(s). The parties also stipulated, however, that the hotel corporations, considered as a group, did meet the Act's dollar volume requirement. Accordingly, the obligation of the corporations to conform to the Act's wage and hour requirements depends on whether the hotel corporations, viewed together, constitute an "enterprise."

[1, 2] The Act defines this term as follows:

> "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments by one or more corporate or other organizational units. . . .

29 U.S.C. § 203(r). This court has considered this statutory definition, its legislative history, and interpretive administrative regulations, and we have concluded that, despite corporate fragmentation in operation, a single "enterprise"

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minimum wage and overtime violations as to companies involved in irrigating rice fields in Louisiana; again, fragmented corporate structuring was at the heart of Alberding's defense against application of the Act, and we rejected the conclusion that such structuring permits avoidance of the Act's requirements. *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190 (5th Cir. 1983).

nevertheless exists for the purpose of the Act, where: (A) the corporations perform related activities, (B) through unified operation or common control, (C) for a common business purpose. *Donovan v. Janitorial Services, Inc.*, 672 F.2d 528, 530 (5th Cir.1982); *Brennan v. Veterans Cleaning Service, Inc.*, 482 F.2d 1362, 1366-67 (5th Cir.1973); *Shultz v. Mack Farland & Sons Roofing Co.*, 413 F.2d 1296, 1299 (5th Cir.1969).[4] The district court correctly found that these three tests are met in the present case.

A. *Related Activities*

[3] The defendants contend that the five hotel corporations do not engage in related activities because the ratio of long-term to short-term guests is different at each. To accept this contention would be to recognize distinctions so fine as to be inconsistent with our previous decisions. *See Donovan v. Janitorial Services, Inc.*, 672 F.2d at 529-30 (janitorial service, maid, and garbage collection companies); *Brennan v. Veterans Cleaning Service, Inc.*, 482 F.2d at 1364-67 (janitorial, maid, and sewer and septic tank cleaning services).

The district court found that each hotel corporation owned a hotel that operated in the same or a similar manner. At one time, Alberding and his business associates planned to place all their hotels under the banner "Alsonett"; though this never became a formal hotel group, the hotels loosely operated under the name. Employees at one hotel assisted, from time to time, at others. By whatever analysis, however, businesses, calling themselves hotels and operating as hotels, whether their guests stay a short or long while, are engaged in related activities for the purpose of the Act.

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[4]Whether an enterprise exists is a conclusion of law (the review of which is not limited by Fed. R.Civ.P. 52(a)'s clearly erroneous standard), although subsidiary factural findings are, of course, subject to review under the clearly erroneous standard. *See Castillo v. Givens*, 704 F.2d 181, 185-87 & n. 12 (5th Cir.1983) (employee and employer status is question in law); *Dunlop v. Ashy*, 555 F.2d 1228, 1229 (5th Cir. 1977) (enterprise existence is question of law).

B. *Unified Operation or Common Control*

By emphasizing the formally distinct nature of the hotel corporations and the day-to-day management of the hotels by different managers, the defendants challenge the district court's conclusion of unified operation and common control.

[4] Nevertheless, "[w]e take the view that these factors are simply the ordinary attributes of separate incorporation and the management of physically separate units." *Shultz v. Mack Farland & Sons Roofing Co., supra,* 413 F.2d at 1300. We must look beyond formalistic corporate separation to the actual or pragmatic operation and control, whether unifed or, instead, separate as to each unit. How centralized is the making of significant corporate decisions? Did a single source create and fund the corporations or businesses in issue or were they created and funded by separate interests? How interdependent are those corporations or businesses in actual operation? Art they held out to the public singly or collectively? *See Donovan v. Janitorial Services, Inc., supra,* 672 F.2d at 530; *Shultz v. Mack Farland & Sons Roofing Co., supra,* 413 F.2d at 1300-01.

The district court found facts to establish each of these unified operation and common control indicators. Of utmost significance, Alberding, as the defendants admit, had and exercised the power to hire and fire the manager of each hotel. Much like a commander and his generals, this put one man, Alberding, at the apex of hotel operations. *See Shultz v. Mack Farland & Sons Roofing Co., supra,* 413 F.2d at 1301.

Beyond his control of the hotel managers, though, the district court found that Alberding incorporated all of the hotel corporations, personally funded them when necessary, and had final and virtually sole authority to approve significant expenditures. He was authorized to sign on the bank account of every hotel. "Money talks." *Id.* Indeed, Alberding was the only person who could approve across-the-board adherence to federal minimum wage and overtime requirements. That, indeed, is a most-significant control indicator in a wage and hours action.

Finally, the hotels loosely operated under the informal Alsonett banner. Employees, albeit infrequently, shifted employment from one hotel to another. Furniture was shifted from one hotel to another. Alberding-related companies provided bookkeeping and financial services to the hotels. Each hotel corporation shared the same officers and directors, and there was what the district court termed a "fluid shifting of debits and credits between the various corporations."

There was abundant evidence that the hotels were centrally directed, connected, and interdependent. They were a loose-knit group, owned by the Alberding family, firmly coordinated and controlled by Alberding. Except for the formality of incorporation and the ownership of stock by different members of the Alberding family, the hotels were centrally controlled by and operated as a single group.[5]

C. *Common Business Purpose*

The defendants weakly challenge the common business purpose conclusion of the district court. The unified operation of the hotels, their related activities and interdependencies, the centralization of control in Alberding, the centralization of ownership in the Alberding family—all these are indicators of common business purpose. They establish "[m]ore than a common goal to make a profit." *Brennan v. Veterans Cleaning Services, Inc., supra,* 482 F.2d at 1367. They establish a family owned and operated business existing for the purpose of operating a group of hotels for the profit of the Alberding family. In short, the commonly-controlled corporate entities were operated, within the meaning of the Act, for a common business purpose.

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[5]The present case is thus distinguishable from *Dunlop v. Ashy,* 555 F.2d 1228, 1233 (5th Cir. 1977), on which defendants rely, because there the owners of a motel leased to a third party, in "an arm's length transaction," the adjacent restaurant, and the third party separately controlled and operated the restaurant.

Summary

[5, 6] The Fair Labor Standards Act is to be construed liberally because by it Congress intended to protect the country's workers. *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 194 (5th Cir.1983). The defendants implicitly assert that each hotel corporation is too small to be covered by the Act. As the preceding discussion demonstrates, the argument draws its only life from the fact of separate incorporation of the entities that in fact operated as a single enterprise performing related activities through a common control. As the authorities previously cited held, separate incorporation may not be used as a device to splinter business activity and thereby to avoid the requirements of the Act.[6]

II. *Alberding As "Employer"*

[7] The permanent injunction before us for review enjoins, as an "employer," Alberding personally and individually from minimum wage and overtime violation at the hotels and holds him subject to an injunction restraining him from

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[6]The defendants also suggest that the "enterprise" conclusion of the district court is somehow affected by the circumstance that three of the hotels were leased to allegedly bona fide third persons on September 10, 1981, October 16, 1982, and November 1, 1982, thus removing these hotels from the enterprise and possibly reducing the remainder to below the gross annual volume required for them statutorily to constitute an enterprise subject to the Act. Suffice it to say, that the record establishes that the five hotels were located as an enterprise with requisite annual volume from 1977 through at least 1981. Whatever relief the defendants might be entitled to seek as to their future liability of the enterprise (if the leases are to bona fide third parties), the five corporations and their president are clearly shown to be subject to the injunctive relief granted (enjoining them from violations and restraining them from withholding from the employees past unpaid minimum wages and overtime compensation due them), based upon their past violations of the Act. *See Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190, 196-97 (5th Cir. 1983) (rejecting a similar contention advanced by Alberding in similar litigation, and noting injunctive relief for past violations is proper even though an employer no longer falls within the statutory definition at some subsequent period).

withholding payment of the compensation due to the plaintiff employees, when the amounts due are determined in the damages phase of the litigation. To be bound by the requirements of the Fair Labor Standards Act, one must be an "employer." 29 U.S.C. §§ 206-07. An employer is "any person acting directly or indirectly in the interests of an employer in relation to an employee." 29 U.S.C. § 203(d).

The Supreme Court has termed the Act's employer definition "expansive" and has held that "managerial responsibilities" and "substantial control of the terms and conditions of the [employer's] work" create statutory employer status. *Falk v. Brennan*, 414 U.S. 190, 195, 94 S.Ct. 427, 431, 38 L.Ed.2d 406 (1973). "The overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages." *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir.1983). This circuit, as to Alberding himself, has underscored the importance of "the economic realities" of employment and affirmed a finding of employer status where there was evidence that Alberding "independently exercised control over the work situation." *Donovan v. Sabine Irrigation Co., supra*, 695 F.2d at 194-95.

Here, to reiterate, the district court found the realities to be: Alberding began and controlled the hotel corporations. He has held their purse-strings and guided their policies. It was only he who could authorize compliance with the Fair Labor Standards Act.[7] He personally selected the manager of every hotel. He travelled to Texas to inspect the hotels and to solve major problems. The hotels were part of the Alberding family business. In short, the hotels, speaking pragmatically, were Alberding's and functioned for the

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[7]We cannot easily imagine firmer proof of Alberding's "employer" status. We recognize that Alberding disputes the fact, but the district court had before it the testimony of hotel managers and employees concerning Alberding's ultimate control over wages. The credibility of this evidence was for the district court's determination. It credited the evidence, and its finding of fact on this issue is far from clearly erroneous. Fed. R.Civ.P. 52(a).

profit of his family. Like the individual statutory employers in *Mack Farland* and *Janitorial Services, supra,* Alberding was the "top man." *Shultz v. Mack Farland, supra,* 413 F.2d at 1300. *See Donovan v. Janitorial Services, Inc., supra,* 672 F.2d at 531 (evidence establishing enterprise also established status of corporate owner as employer).[8]

III. *Personal Jurisdiction Over Alberding*

Alberding, an Illinois resident, asserts that the Texas federal district court erred in denying his motion to dismiss for lack of personal jurisdiction. This contention is patently without merit.

[8] "The concept of personal jurisdiction comprises two distinct components: amenability to jurisdiction and service of process." *DeMelo v. Touche Marine, Inc.,* 711 F.2d 1260, 1264 (5th Cir.1983). When personal jurisdiction over a non-resident is asserted by reason of a state long-arm statute, not only must the statute apply,[9] but its application "must comport with due process requirements of the fourteenth amendment." *Id.,* 711 F.2d at 1265.

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[8]Contrary to the appellants' assertions, *Wirtz v. Pure Ice Co.,* 322 F.2d 259, 262-63 (8th Cir. 1963), does not support a different result. There the controlling shareholder of the corporation had not "supervised the relationship between the corporation and its employees" *id.* at 263, and "had nothing to do with the hiring of the employees or fixing their wages and hours," *id.* at 263.

[9]Since the *DeMelo* test is plainly satisfied here, we need not consider whether anything more than the conceded technical effectiveness of the physical service under the Texas long-arm statute is required when the plaintiff's cause of action is founded on federal question jurisdiction. As *DeMelo* concedes, although holding that a non-resident must in such circumstance be amenable to jurisdiction under the terms of a state long-arm statute, our circuit jurisprudence is conflicting as to this issue, 711 F.2d at 1264-66. Thus, *Lapeyrouse v. Texaco, Inc.,* 693 F.2d 581, 585 (5th Cir.1982), hold that the state long-arm test of jurisdiction over the properly served non-resident becomes irrelevant " 'where the power of the

[9] Alberding was plainly amenable to suit under the Texas long-arm statute, Tex.Rev.Stat. § 2031b. That statute provides that jurisdiction may be asserted over a non-resident who has engaged in business in Texas

> by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this state, or the committing of any tort in whole or in part in this state. *The act of recruiting Texas residents directly or through an intermediary located in Texas for employment inside or outside of Texas shall be deemed doing business in this state.*

Tex.Rev.Civ.Stat. § 2031b(4) (emphasis added).

Alberding's conduct falls squarely within this description of non-residents amenable to personal jurisdiction under the Texas long-arm statute. Alberding himself hired the managers of the five Texas hotels. He delegated to those managers — his statutory "intermediaries" — the authority to hire the other employees of the hotels, the very persons who are plaintiffs in this action. Alberding regularly travelled to Texas in connection with the operation of the Texas hotels. And he made personal loans to the Texas hotel corporations and personally signed loan agreements for the Texas hotel improvements. This conduct satisfies the doing-business-by-contract test of the Texas long-arm statute, including the employee recruitment test of that statute.

Nor do we find merit to Alberding's argument that, because his contracts with Texas were in his role of corporate president, he himself was not doing business in Texas so as to be subject to personal jurisdiction under the Texas

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federal court . . . can be independently sustained . . . on the ground that the matter in controversy arises under the Constitution, laws or treaties of the United States' " and that, once technical compliance with the requirements of service under the state statute is shown, the "appropriate inquiry lies with the due process of laws clause of the Fifth Amendment" in determining whether personal jurisdiction over the non-resident may be exercised by the federal court in such federal question jurisdiction.

long-arm statute.[10] Here, however, Alberding is not sought to be held derivatively liable for acts performed by the corporation(s) in Texas that Alberding had simply authorized solely in his corporate capacity while he was at a non-resident situs.

Most importantly, Alberding is sued for violations of the federal statute, under which he is statutorily characterized as an employer and is personally responsible for defaults because of his substantial personal control of the terms and conditions of the Texas employee's work in Texas. *See* II *supra*. He, no less than the corporations he owned, directed, and controlled, is personally liable for unpaid statutory wages to his employees. *Id.* Consequently, his Texas-connected acts that produced injurious effects to the Texas-based employees cannot, as a matter of law or fact, be regarded as performed solely in his corporate capacity. Moreover, as previously noted, Alberding's personal presence in Texas in connection with those acts, and his personal acts in connection with those Texas enterprises, were not insubstantial.[11]

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[10]Alberding relies upon what he terms a "fiduciary shield" principle that "jurisdiction over individual officers and employees of a corporation may not be predicated on the court's jurisdiction over the corporation itself, unless the individuals are engaged in activities within their jurisdiction that would subject them to the coverage of the state's long-arm staute." 4 Wright and Miller, Federal Practice and Procedure (1983 Supp.), pp. 58-60.

[11]The Texas decisions upon which Alberding relies in his "fiduciary shield" argument do not support his contention that Texas long-arm jurisdiction cannot be obtained over a corporate officer who himself commits acts in Texas or who commits acts with reasonably foreseeable consequences in Texas for which he may be held personally liable.

In *Siskind v. Villa Foundation for Education, Inc.*, 642 S.W.2d 434 (Tex.1982), the Texas Supreme Court held non-resident corporate officers not to be within the personal jurisdiction of the Texas courts. *Id.* at 437-38. The court held that corporate conduct in Texas could not be "imputed to the individual" officers without some showing of acts in Texas by these employees. *Id.* By negative

[10] Likewise, the personal jurisdiction afforded over the non-resident Alberding by the Texas long-arm statute plainly comports with constitutional due process requirements. Alberding's acts and Texas-connected activities plainly show sufficient "minimum contacts" with Texas, that he "purposefully availed himself of the benefits" of Texas, that he engaged in conduct "that bears reasonably foreseeable consequences" in Texas, and that Texas and 177 Texas employees have a strong interest in litigating in Texas, the forum of the wage and hour dispute. *See DeMelo v. Touche Marine, Inc.*, 711 F.2d at 1270. Consistent with due process, an employer fairly may be sued for employment practices in the forum in which he has recruited his employees and caused them to undertake their work. *See Garcia v. Vasquez*, 524 F.Supp. 40, 42 (S.D.Tex.1981).

[11] Nor is due process offended when a non-resident corporate agent or employee is made subject to personal jurisdiction in the forum state for a foreseeable consequence therein of his personal act performed elsewhere, although allegedly performed only as a corporate functionary. *Calder*

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implication, the court indicated that there would be personal jurisdiction over the officers if there were allegations of "specific acts" on their part giving rise to jurisdiction. *Id.* The court further noted

> Absent some allegations of a specific act in Texas, or one with reasonably foreseeable consequences within the state's borders, a nonresident employee of a foreign corporation cannot be sued in Texas simply because his or her employer solicits business here.

Id. at 438.

> Due process is satisfied if the defendant's activities outside the state have reasonably foreseeable consequence in the forum. Siskind, however, does not allege any act on the part of these individuals from which we can infer a reasonably foreseeable consequence occurring [in] Texas.

Id. at 438 n. 5 (citation omitted). *Cf. Hoppenfeld v. Crook*, 498 S.W.2d 52, 58 (Tex.Civ.App.—Austin 1973, writ ref'd n.r.e.) (no jurisdiction over corporate president who never went to Texas, did not solicit plaintiff's business, and was not alter ego of corporation).

v. Jones, ——U.S.——, ——, 104 S. Ct. 1482, 1487, 79 L.Ed.2d 804 (1984). As there stated, upholding California personal jurisdiction over Florida employees of a corporation,

> Petitioners are correct that their contacts with California are not to be judged according to their employer's activities there. On the other hand, their status as employees does not somehow insulate them from jurisdiction. Each defendant's contacts with the forum State must be assessed individually. In this case, petitioners are primary participants in an alleged wrongdoing intentionally directed at California residents, and jurisdiction over them is proper on that basis.

Id. (citation omitted).

IV. *Res Judicata*

[12, 13] The defendants finally contend that, somehow, res judicata bars the present action by the Secretary and 177 Texas employees of five Texas hotels owned by five Alberding-controlled corporations because of prior litigation with regard to an Oklahoma hotel and three Oklahoma corporations, as well as Alberding himself. In this prior litigation, the Eighth Circuit held the Oklahoma operation to be part of a single "enterprise" (including some 35 hotels), and Alberding an "employer" (thus rejecting contentions similar to the present that the corporate-fragmentation of the enterprise permitted it to evade application of the federal wages and hours act). *See* note 3 *supra*. If we understand the defendants' contention, it is that the earlier Oklahoma suits bar the present one because, although directed only at securing wage/hour compliance and back pay for employees at the Oklahoma hotel, it involved the same Alberding enterprise as that now found to exist—although, in this case, involving the employees at five Texas hotels and five corporations owning them that were not made parties to the Oklahoma litigation (although named as among the 33 hotels forming part of the Alberding-controlled enterprise there found).

The test in this circuit for determining whether a claim is barred by res judicata is as follows:

> " 'For a prior judgment to bar an action on the basis of *res judicata*, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits and the same cause of action must be involved in both cases.' " *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556, 559 (5th Cir. 1983) (en banc), quoting *Kemp v. Birmingham News Co.*, 608 F.2d 1049, 1052 (5th Cir.1979).

Among other deficiencies in the defendants' res judicata argument, it suffices that we note that the Oklahoma suit involved neither the same cause of action nor the identical parties (or privies thereto) as did the present suit. The Oklahoma suit was brought on behalf of employees at an Oklahoma hotel, whereas the present suit is brought on behalf of employees at five Texas hotels. Whether the test of the same cause of action be whether the primary right and duty or wrong are the same in each action or be, instead, whether the claim arises out of the same transaction, *Nilsen v. City of Moss Point, supra*, 701 F.2d at 559, 560 & n. 4, it is not met here, where the previous Oklahoma suit included only the payment of statutorily required wages to employees of an Oklahoma hotel, whereas the present suit concerns the wages not paid to the employees of the Texas hotels.

Moreover, the present action concerned wage and hour violations as to a different group of employees occurring almost wholly *after* the entry of judgment in the previous Oklahoma action.[12] The prior decisions of this circuit recog-

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[12]The Texas action was filed February 14, 1980 and sought back pay for violations occurring after February 14, 1977. In the Oklahoma action, the district awarded relief for violations in the period May 1, 1973 to November 11, 1976. *Marshall v. McAlester Corp.*, 438 F.Supp. at 1014 (March 31, 1977).

nize that a prior adjudication for or against an employer with regard to Fair Labor Standards Act violations does not bar a subsequent suit against him arising from a subsequent or different factual situation, *Hodgson v. Royal Crown Bottling Company, Inc.*, 465 F.2d 473, 475 (5th Cir.1972), or from "the activities of an entirely different group of people," *Credit Service, Inc. v. Fleming*, 372 F.2d 143, 146 (5th Cir.1967).

The defendants' contention that res judicata bars the present suit thus has no merit. Aside from its lack of even technical merit, we are additionally unable to resist the comment that the argument is functionally foolish that the Secretary cannot enjoin wage and hour violations in one state or at one locality because he did not attempt to join relief for these employees when he enjoined wage and hour violations in another state or at another locality, or that the former employees may forever be deprived by such alleged failure of the Secretary in the earlier litigation (concerning other employees) of the statutory protection Congress intended to afford them by its enactment of the Fair Labor Standards Act.

Conclusion

For the foregoing reasons, we AFFIRM the district court judgment appealed from.

AFFIRMED.

APPENDIX F

Tex. Rev. Civ. Stat. art. 2031b. Service of Process Upon Foreign Corporations and Nonresidents.

Failure to appoint agent; designation of Secretary of State as lawful attorney

Section 1. When any foreign corporation, association, joint stock company, partnership, or non-resident natural person required by any Statute of this State to designate or maintain a resident agent, or any such corporation, association, joint stock company, partnership, or non-resident natural person subject to Section 3 of this Act, has not appointed or maintained a designated agent, upon whom service of process can be made, or has one or more resident agents and two (2) unsuccessful attempts have been made on different business days to serve process upon each of its designated agents, such corporation, association, joint stock company, partnership, or non-resident natural person shall be conclusively presumed to have designated the Secretary of State of Texas as their true and lawful attorney upon whom service of process or complaint may be made.

Engaging in business in state; service upon person in charge of business

Sec. 2. When any foreign corporation, association, joint stock company, partnership, or non-resident natural person, though not required by any Statute of this State to designate or maintain an agent, shall engage in business in this State, in any action in which such corporation, joint stock company, association, partnership, or non-resident natural person is a party or is to be made a party arising out of such business, service may be made by serving a copy of the process with the person who, at the time of the service, is in charge of any business in which the defendant or defendants are engaged in this State, provided a copy of such process, together with notice of such service upon such person in charge of such business shall forthwith be

sent to the defendant or to the defendants principal place of business by registered mail, return receipt requested.

Act of engaging in business in state as equivalent to appointment of Secretary of State as agent

Sec. 3. Any foreign corporation, association, joint stock company, partnership, or non-resident natural person that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation, joint stock company, association, partnership, or non-resident natural person of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation, joint stock company, association, partnership, or non-resident natural person is a party or is to be made a party.

Doing business in state; definition

Sec. 4. For the purpose of this Act, and without including other acts that may constitute doing business, any foreign corporation, joint stock company, association, partnership, or non-resident natural person shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State. The act of recruiting Texas residents, directly or through an intermediary located in Texas, for employment inside or outside of Texas shall be deemed doing business in this State.

Delivery of process to Secretary of State; forwarding copy

Sec. 5. Whenever process against a foreign corporation, joint stock company, association, partnership, or non-resident natural person is made by delivering to the Secretary of State duplicate copies of such process, the Secretary of State shall require a statement of the name and address of the home or home office of the non-resident. Upon receipt of such process, the Secretary of State shall forthwith forward to the defendant a copy of the process by registered mail, return receipt requested.

Non-residency after accrual of cause of action; service upon Secretary of State

Sec. 6. When any corporation, association, joint stock company, partnership or natural person becomes a non-resident of Texas, as that term is commonly used, after a cause of action shall arise in this State, but prior to the time the cause of action is matured by suit in a court of competent jurisdiction in this State, when such corporation, joint stock company, partnership or natural person is not required to appoint a service agent in this State, such corporation, association, joint stock company, partnership or natural person may be served with citation by serving a copy of the process upon the Secretary of State of Texas, who shall be conclusively presumed to be the true and lawful attorney to receive service of process; provided that the Secretary of State shall forward a copy of such service to the person in charge of such business or an officer of such company, or to such natural person by certified or registered mail, return receipt requested.

Cumulative effect of act

Sec. 7. Nothing herein contained shall be construed as repealing any statute in force in this State in reference to service of process, but this Act shall be cumulative of all existing statutes.

APPENDIX G

Fair Labor Standards Act, 29 U.S.C. § 201 et. seq. (selected provisions)

§ 201. Short title

This chapter may be cited as the "Fair Labor Standards Act of 1938".

§ 203. Definitions

As used in this chapter—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

* * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e) (1) Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer.

* * *

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or

articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

* * *

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage of a tipped employee,

the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 40 per centum of the applicable minimum wage rate, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

* * *

(o) Hours Worked.—In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

* * *

(q) "Secretary" means the Secretary of Labor.

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: *Provided*, That, within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be

so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments. For purposes of this subsection, the activities performed by any person or persons—

(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), or

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(3) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods

for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise, other than an enterprise which is comprised exclusively of retail or service establishments and which is described in paragraph (2), whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated);

(2) is an enterprise which is comprised exclusively of one or more retail or service establishments, as defined in section 213(a)(2) of this title, and whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), beginning July 1, 1978, whose annual gross volume of sales made or business done is not less than $275,000 (exclusive of excise taxes at the retail level which are separately stated), beginning July 1, 1980, whose annual gross volume of sales made or business done is not less than $325,000 (exclusive of excise taxes at the retail level which are separately stated), and after December 31, 1981, whose annual gross volume of sales made or business done is not less than $362,500 (exclusive of excise taxes at the retail level which are separately stated);

(3) is engaged in laundering, cleaning, or repairing clothing or fabrics;

(4) is engaged in the business of construction or reconstruction, or both;

(5) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(6) is an activity of a public agency.

Any establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection. The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

Notwithstanding paragraph (2), an enterprise which is comprised of one or more retail or service establishments, which on June 30, 1978, was subject to section 206(a)(1) of this title, and which because of a change in the dollar volume standard in such paragraph prescribed by the Fair Labor Standards Amendments of 1977 is not subject to such section, shall, if its annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), pay its employees not less than the minimum wage in effect under such section on the day before such change takes effect and shall pay its employees in accordance with section 207 of this title. A violation of the preceding sentence

shall be considered a violation of section 206 or 207 of this title, as the case may be.

* * *

§ 206. Minimum wage

Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;

* * *

Additional applicability to employees pursuant to subsequent amendatory provisions

(b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a) (5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966, title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974, wages at the following rate: Effective after

December 31, 1977, not less than the minimum wage rate in effect under subsection (a) (1) of this section.

* * *

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966 —

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

(e) Definition of "regular rate" of employment

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include —

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section, where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

(f) Employment necessitating irregular hours of work

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such em-

ployee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

* * *

(h) Extra compensation creditable toward overtime compensation

Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

(i) Employment by retail or service establishment

No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

* * *

§ 215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person —

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206 or section 207 of this title, or in violation of any regulation or order of the Administrator issued under section 214 of this title; except that no provision of this chapter shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this chapter shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

(4) to violate any of the provisions of section 212 of this title;

(5) to violate any of the provisions of section 211(c) of this title, or any regulation or order made or continued in effect under the provisions of section 211(d) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) of this section proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

§ 216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision

(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate

the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court

of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

* * *

§ 217. Injunction proceedings

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause

shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a) (2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

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No. 84-1376

In the Supreme Court of the United States

OCTOBER TERM, 1984

GRIM HOTEL COMPANY, ET AL., PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether five corporations, all engaged in the hotel business and controlled by the same individual, are an "enterprise" within the meaning of Section 3(r) of the Fair Labor Standards Act, 29 U.S.C. 203(r).

2. Whether a corporate officer who exercises significant day-to-day control over the affairs of a business, including decisions over wages, is an "employer" within the meaning of Section 3(d) of the Fair Labor Standards Act, 29 U.S.C. 203(d).

3. Whether the district court properly exercised jurisdiction, under a state long-arm statute, over a non-resident corporate officer who was engaged in substantial in-state activities.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. E1-E20) is reported at 747 F.2d 966. The district court's opinions (Pet. App. C1-C22 and D1-D4) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1984, and the petition for a writ of certiorari was filed on March 1, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Secretary of Labor brought suit against five hotels and their president, alleging that the hotels failed to pay the minimum wage and overtime compensation to their employees, as required by the Fair Labor Standards Act (FLSA). The district court rejected petitioners' arguments that the hotels are not an "enterprise"covered by the Act, that the

president is not an "employer" under the Act, and that the court lacked jurisdiction over the president. It held that petitioners had violated the Act (Pet. App. C1-C22, D1-D4). The court of appeals affirmed (Pet. App. E1-E20).

Petitioner Charles Alberding, a resident of Chicago, Illinois, is founder and president of the five petitioner corporations, each of which owns a hotel located in Texas (Pet. App. E7). The Secretary of Labor brought suit in the United States District Court for the Eastern District of Texas, under Sections 16(c) and 17 of the Act, 29 U.S.C. 216(c) and 217, to enjoin the hotels and Alberding from violating the minimum wage and overtime provisions of the FLSA and to obtain damages (Pet. App. E5-E6). The hotels admittedly failed to comply with the minimum wage and overtime provisions of the FLSA.[1]

Alberding moved to dismiss the complaint for lack of personal jurisdiction under the Texas long-arm statute, Tex. Rev. Civ. Stat. Ann. art. 2031b (Vernon 1964). The court denied the motion in 1981. It found that Alberding was "clearly 'doing business' in Texas" for purposes of personal jurisdiction under the long-arm statute and that he had "purposefully availed himself of the benefits and protections of Texas law." Therefore, the court held that the exercise of "personal jurisdiction over him * * * does not offend the constitutional requirement of due process of law." Pet. App. D3-D4.

A trial on the issue of liability followed. The hotels argued that they are not an "enterprise" under Section 3(r) of FLSA, 29 U.S.C. 203(r). The Act applies to enterprises

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[1]The hotels paid employees working as desk clerks and maids anywhere from $1.30 to $2.30 per hour, significantly less than the minimum wage rate in effect. The hotels did not pay a premium for overtime work, so employees who worked over 40 hours per week did not receive one and one-half times their normal rate of pay as required by the Act. Pet. App. C1-C2, E6; 29 U.S.C. 206, 207.

with an annual gross volume of business of at least the amount specified in Section 3(s), 29 U.S.C. 203(s). The parties stipulated that each of the hotels, individually, had an annual gross of less than the jurisdictional amount but that, cumulatively, their annual gross exceeded that amount. Pet. App. E8. The district court held, in 1983, that the five hotels constituted an enterprise because they engaged in related activities (Pet. App. C9-C13), they shared a common business purpose (*id.* at C13-C15), and they were subject to centralized control (*id.* at C15-C17). The district court also held that Alberding was an "employer" under Section 3(d) of the FLSA, 29 U.S.C. 203(d), finding that he "exercised ultimate control" over the business activities of the hotels. Pet. App. C17-C20. The court held that petitioners had violated the Act willfully and were therefore liable for three years' back pay (*id.* at C20-C21). It enjoined future violations as well (*id.* at B1-B2).

The court of appeals affirmed (Pet. App. E1-E20). It found that the "hotels were centrally directed, connected, and interdependent" (*id.* at E11). The court noted that separate incorporation of the hotels did not exclude them from coverage under the FLSA. Because, in fact, they "operated as a single enterprise performing related activities through a common control," the court held that they were an enterprise under Section 3(r) of the FLSA, 29 U.S.C. 203(r) (Pet. App. E12).

On the issue of whether Alberding was an "employer" under the FLSA, the court of appeals found that he controlled the hotels and their purse-strings, guided their policies, personally selected their managers, and traveled to Texas to inspect them and resolve major problems. The court concluded that "the hotels, speaking pragmatically,

were Alberding's and functioned for the profit of his family." Pet. App. E13-E14.[2]

The court of appeals also rejected Alberding's contention that the district court erred in denying his motion to dismiss for lack of personal jurisdiction, noting that Alberding's personal presence in Texas and his personal acts in connection with the hotels "were not insubstantial" (Pet. App. 14-E16), so that exercise of jurisdiction over Alberding under the Texas long-arm statute comported with due process (id. at E17-E18).

ARGUMENT

The court of appeals correctly applied well-settled legal principles to the facts of this case. Its decision does not conflict with any decision of this Court or of another court of appeals. Petitioners' arguments that the hotels are not an "enterprise" and that Alberding is not an "employer" are based largely on their disagreement with the district court's factual findings, which the court of appeals concluded were correct, and do not warrant further review. Alberding's argument that the district court lacked jurisdiction over him is without merit.

1. Petitioners argue (Pet. 12-13) that the hotels are not an enterprise because they are not engaged in "related activities." Petitioners argue, primarily, that the hotels are not related because the ratio of long-term guests to short-term

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[2]The court noted (Pet. App. E7-E8 n.3) that it had, in a prior case, found Alberding to be an employer responsible for minimum wage and overtime pay violations of a Louisiana corporation that he controlled. *Donovan* v. *Sabine Irrigation Co.*, 695 F.2d 190, 195 (5th Cir.), cert. denied, 463 U.S. 1207 (1983). In addition, the Tenth Circuit has found Alberding responsible for minimum wage and overtime pay violations at Oklahoma hotels that he controlled. *Marshall* v. *McAlester Corp.*, No. 78-1303 (Mar. 7, 1980) (unpublished), cert. denied, 449 U.S. 828 (1980).

guests differs among the hotels. As the court of appeals concluded (Pet. App. E9), this does not change the essential nature of the hotels' business. The court properly found that "businesses, calling themselves hotels and operating as hotels, whether their guests stay a short or long while, are engaged in related activities for the purpose of the Act" (Pet. App. E9). See *Donovan* v. *Janitorial Services, Inc.*, 672 F.2d 528, 529-530 (5th Cir. 1982); *Brennan* v. *Plaza Shoe Store, Inc.*, 522 F.2d 843, 847-848 (8th Cir. 1975). See also *Brennan* v. *Veterans Cleaning Service, Inc.*, 482 F.2d 1362, 1366-1367 (5th Cir. 1973).[3]

Contrary to petitioners' further contention (Pet. 13-14), the hotels were clearly "commonly controlled," since they "were centrally directed, connected, and interdependent" (Pet. App. E11). Petitioners argue with the court's factual conclusions in this regard by pointing to the separate incorporation of each of the hotels and the Alberding family's hypothetical control over the hotels by virtue of its stock ownership. But corporate fragmentation of the businesses that make up an enterprise does not exclude coverage under the FLSA. As the court of appeals concluded, the separate incorporation of each of the hotels and their stock ownership were a "formality" and in practice the hotels were "centrally controlled by and operated as a single group"

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[3]Contrary to petitioners' assertion (Pet. 12), there is no conflict between this case and *Hodgson* v. *University Club Towers, Inc.*, 466 F.2d 745 (10th Cir. Cir. 1972). The court in *Hodgson* held that the activities of a corporation engaged exclusively in the operation of a hotel and those of a corporation engaged exclusively in the operation of apartment houses were not "related" within the meaning of the FLSA (*id.* at 746). Here, in contrast, petitioners made no showing that the units at any of the hotels were under lease to permanent residents for extended periods. Furthermore, in *Hodgson*, there was a lack of other factors that would have led to a finding of enterprise coverage, such as employee interchange, common bookkeeping, and unified management — factors that are all present in this case.

(Pet. App. E11). See *Donovan* v. *Sideris*, 688 F.2d 74, 75-76 (8th Cir. 1982); *Donovan* v. *Sabine Irrigation Co.*, 695 F.2d at 194-195; *Schultz* v. *Mack Farland & Sons Roofing Co.*, 413 F.2d 1296, 1299-1301 (5th Cir. 1969). In any event, this factual issue does not warrant the Court's attention.

2. Petitioners also assert (Pet. 6-8) that Alberding was not an "employer" within the meaning of 29 U.S.C. 203(d). Once again, petitioners' argument is based largely on their disagreement with the factual findings made by the district court and affirmed by the court of appeals.

In determining whether the evidence established that Alberding was an employer, the courts properly examined the "economic realities of employment." *Donovan* v. *Agnew*, 712 F.2d 1509, 1510 (1st Cir. 1983); *Donovan* v. *Sabine Irrigation Co.*, 695 F.2d at 193. See also *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, No. 83-1935 (Apr. 23, 1985), slip op. 10; *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961). An individual is deemed to be an "employer" under the FLSA when he has "substantial control of the terms and conditions of the work of * * * employees" (*Falk* v. *Brennan*, 414 U.S. 190, 195 (1973)). As the district court stated (Pet. App. C19, quoting *Donovan* v. *Sabine Irrigation Co.*, 695 F.2d at 194-195), the definition of "employer" in the FLSA is "sufficiently broad to encompass an individual who, though lacking a possessory interest in the 'employer' corporation, effectively dominates or otherwise acts, or has the power to act, on behalf of the corporation vis-a-vis its employees." Here, Alberding controlled the hotels' purse-strings, guided their policies, chose their managers, and traveled to Texas to inspect them and solve their major problems. Only he could have authorized compliance with the minimum wage

and overtime compensation provisions of the FLSA.[4] The court of appeals concluded that it could not "imagine firmer proof of Alberding's 'employer' status" (Pet. App. E13 & n.7).

Contrary to petitioner's assertion (Pet. 6), the court did not apply a "strict liability" test for corporate officers for FLSA violations, nor is that the effect of the court's decision. Rather, the court fully examined Alberding's relationship to the hotels in accord with settled legal principles before concluding that he was an employer within the meaning of the FLSA. See *Donovan* v. *Sabine Irrigation Co.*, 695 F.2d 190, 194-195 (5th Cir. 1983), aff'g 531 F. Supp. 923, 928-929 (W.D. La. 1981), cert. denied, 463 U.S. 1207 (1983).[5] Further review of these factual issues is clearly unwarranted.

3. As the court of appeals held (Pet. App. E14), petitioners' argument that the district court had no personal jurisdiction over Alberding "is patently without merit." There is no doubt that Alberding was doing business in Texas, as

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[4]The court of appeals noted (Pet. App. E13 n.7) that petitioners dispute the finding that Alberding controlled employees' wages, but concluded that the district court's finding, based on credited testimony regarding Alberding's ultimate control of major expenditures, was "far from clearly erroneous." The court of appeals also noted that, even if the district court erred in admitting the hearsay evidence that wage increases required Alberding's approval, the error was harmless (Pet. App. E7 n.2).

[5]*Donovan* v. *Agnew*, 712 F.2d 1509, 1513 (1st Cir. 1983), cited by petitioners to support their argument that the court improperly found Alberding to be an "employer," actually supports the decision of the court of appeals in this case. The court of appeals in *Agnew* found two corporate officers to be personally liable for FLSA violations where the officers "had operational control of significant aspects of the corporation's day to day functions, including compensation of employees" (712 F.2d at 1514). The similar factual findings in this case support the conclusion that Alberding is an "employer."

required by the Texas long-arm statute, Tex. Rev. Civ. Stat. Ann. art. 2031b § 4 (Vernon 1964). He hired the hotel managers, regularly traveled to Texas in connection with operation of the hotels, and made loans to the hotels (Pet. App. E15). Nor were these actions taken solely by Alberding in his corporate capacity, since he was an "employer" under the FLSA, personally had control of the terms and conditions of employment of Texas employees, and was personally present in Texas (Pet. App. E16). Contrary to petitioners' contention (Pet. 9), there is nothing "fundamentally unfair" about the court's assertion of jurisdiction over a corporate officer because of actions outside of the state that directly affect employees in the state where jurisdiction is asserted. See *Calder* v. *Jones*, No. 82-1401 (Mar. 20, 1984). See also *DeMelo* v. *Touche Marine, Inc.*, 711 F.2d 1260, 1272 (5th Cir. 1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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